

IRELAND AND THE BRITISH EMPIRE, 1937
CONFLICT OR COLLABORATION?

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*A STUDY OF ANGLO-IRISH DIFFERENCES FROM
THE INTERNATIONAL STANDPOINT*

By
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"THE IRISH CASE CONSIDERED," "PARNELL VINDICATED,"
"THE STRANGE CASE OF THE IRISH LAND PURCHASE ANNUITIES,"
"SPOTLIGHTS ON THE ANGLO-IRISH FINANCIAL QUARREL,"
"THE GAME OF BEGGAR-MY-NEIGHBOUR, WHO WINS?"

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To
CLIO, THE MUSE OF HISTORY

THIS BOOK

CONTAINING A RECORD OF VERIFIED FACTS,

IS DEDICATED IN ALL RESPECT

BY

THE AUTHOR

. . . "and all the while the gaunt spectre of the Irish Question haunts us still. It has been well said that it has never passed into history for it has never passed out of present-day politics." —THE ARCHBISHOP OF CANTERBURY (Hansard, 15th December, 1921, Col. 73).

"For his part, he had rather see Ireland totally separated from the Crown of England, than kept in obedience only by force. Unwilling subjects were little better than enemies, it would be better not to have subjects at all, than to have such as would be continually on the watch to seize the opportunity of making themselves free. If this country should attempt to coerce Ireland, and succeed in the attempt, the consequence would be, that, at the breaking out of every war with any foreign power, the first step must be to send troops over to secure Ireland, instead of calling upon her to give a willing support to the common cause.

"Having said thus much with regard to the repeal of the 6th of George I, which he intended to agree to in the most unequivocal manner, he touched next upon the appellant jurisdiction. Upon this question he thought that there was no manner of difficulty whatever; for when the great question of legislation was given up, he did not see that it was of any consequence still to maintain in this country the jurisdiction in appeals: but even if it was a desirable object, or likely to strengthen the tie between the two countries, it must be given up, for the Irish insisted upon it; and there was a particular reason for complying with their desires on that head. The decrees of judgements of our Courts of law in matters of appeal, were to be carried into execution—where? In Ireland. By whom? By the people of Ireland. Now, as the people of Ireland had one and all declared, that they would not execute or obey any order of any English tribunal, it would be nugatory and absurd to maintain the appellant jurisdiction to Great Britain; and consequently it would be better to give it up with a good grace, than to keep it as a bone of contention between the two countries."—CHARLES JAMES FOX—"MR. SECRETARY FOX" (Hansard, 17th May, 1782, Col. 23).

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IRELAND AND THE BRITISH EMPIRE, 1937

CHAPTER I

THE INTERNATIONAL POSITION AND ITS MENACE OF WORLD WAR

THE relationship between Ireland and Great Britain after seven hundred and fifty years of uneasy maladjustment, underwent an abrupt transition at the close of 1921. Ireland ceased to be a portion of the United Kingdom. It became instead one of "the group of self-governing communities composed of Great Britain and the Dominions." In other words, Ireland (subject to the secession of six of her thirty-two counties) became the Irish Free State with the status of a Dominion. This great change was effected in virtue of the Anglo-Irish Treaty of 1921 which terminated active operations of armed conflict.

To-day, in the year 1937, Great Britain and the Irish Free State are sundered in spirit and in policy by a conflict which has been waged since 1932. It has been confined, fortunately, to the economic sphere so far as active operations have resulted. But although the state of affairs thus arising is certainly preferable to that ended by the Treaty, it is still of such gravity in its consequences and in its potentialities as to furnish legitimate cause for infinite disquietude. It is not in the immediate results that the threat of stark catastrophe is to be seen. The sabotage of the old-established and very valuable Anglo-Irish trade is, of course, deplorable. And, as Ireland has been found to be capable of enduring it no less than Britain, a situation of mutually harmful

antagonism has been stabilised as a normal condition of co-existence. It is in the ultimate consequences that the conflict may prove to have been pregnant of ruin to both. To both? To much more than both. To the British Commonwealth of Nations itself and to that system of civilisation, based upon ordered progress and the rule of law, which growing from its deeply-rooted stem in Western Europe has pushed its branches, flourishing and vigorous, amidst great territories and vast populations in every continent of the habitable globe.

The Anglo-Irish Treaty which was destined to be the final appeasement of the age-long struggle was the outcome of considerations relating to foreign rather than to constitutional politics. A realism induced by war-time experience, and assessing for present and future purposes forces and resources and contingencies upon a war-time basis, dictated concessions which were hard to make. Better, it was realised, a willing friend than a mutinous subject: and better still when the mutinous subject has world-wide affiliations of potent influence in thwarting policy and besmirching reputation. Statesmanship in Britain reminded itself that when Pitt had brought about the Union of 1800 as a war-time measure the population of Ireland stood in relation to the population of Britain in the ratio of one to two, whereas to-day it was only as one to ten. And the same statesmanship was fain to remind itself that the Irish were the more prolific stock and that the loss of Irish population in Ireland implied all the greater numbers of Irish race abroad. The fact that Ireland was a Motherland no less than Britain became almost a commonplace in the discussions of publicists. It was thus that the fierce claim to dominance gave place to the offer of full partnership on equal terms in the world-wide Commonwealth of Nations. A secondary factor in producing this result was the embarrassment to Great Britain in having her Army entangled in active operations in Ireland to an extent that

not merely affected her prestige but tied her hands in the devising and execution of her policies abroad. Parliament was fully apprised of such considerations, in the course of the Treaty debates, from the speeches of the Prime Minister, the Foreign Secretary, the Lord Chancellor, the Colonial Secretary and the Secretary of State for War.

It is only reasonable, then, when dealing with Anglo-Irish relations in their present aspect, to begin by viewing them against a background of foreign affairs. It would be sheer folly to disregard the standards of "power politics" in these days when the sword is so often thrown into the scale with so little decent covering of argument or principle. Can it be said that the position on the continent of Europe or in the Far East is less menacing now, in 1937, than it was in 1921-22? Can it be fairly claimed that the position of Britain and of the Empire is more secure? Does Britain dispose of resources as large—in relation to those of her possible adversaries—as her resources of men, armaments, supplies and allies were during the war or in 1921-22? Is her financial credit with the outside world as strong—is her prestige, her valuation as a possible combatant, as high as it was?

If, as men fear, the unrest fermenting amidst great populations is soon to explode in a cataclysm which may end Western civilisation, the position of Britain will expose her to a full share of the shock. Indeed, she may well have to bear the brunt. Then she must fight, and fight well, or be stripped bare of all her great possessions. Would she wish, when that crisis is upon her, to have Ireland at her side, a wholehearted ally of proved fighting quality? Ireland, for her part, cherishes the memory of her distant past in the Dark Ages when she played a notable part in saving rich relics of the faith and learning of the older classical civilisation and in teaching them to the unlettered pagans that had overthrown it. Her sympathies are with the cause of civilisation still. She has no tolerance for

tyranny or intolerance, whencesoever they come. She has her enthusiasms for faith and freedom, for the older wisdom, for individual liberty, for order, for democracy, for progress, above all, for resisting alien invasion of her territory. Would Ireland stand by Britain and the Empire? The answer cannot be a simple "yes" or "no."

It is well to eliminate from consideration one element of error which in courtesy must be deemed to issue merely from ignorance. It is often said: "Why worry about Ireland? Ireland did nothing in the Great War." The reply to this is of decisive significance in its bearing upon the main problem. That reply is that Ireland's contribution to the forces and resources of Great Britain in the Great War was so substantial and of such a character that if it had conceivably been withheld defeat and not victory for the Western powers might well have been the result. It is true that British official records of that contribution are hard to come by, but the fact is as stated. This will be clearly seen in Chapter II where authentic figures are given that will come as a surprise to many. And it must be added that not the least obstacle to a close and cordial co-operation between Ireland and Britain in a possible future war is to be found in the memory of 1914-18—of how Ireland's military effort was flouted and thwarted and then statistically attributed in large measure to others, of how by concealment, evasion and official silence the sacrifices of those that died were made to be as though they had never been. "Eaten bread is soon forgotten," but the donor is the last to forget—and the first to recall it if he is asked for more.

If war comes, Ireland's contribution will be a matter for herself to decide. The moot point as to whether neutrality for a Dominion is constitutionally permissible if the Empire be at war is merely academic, for it would probably be definitively determined by the enemy. But as between standing aloof and participation, or the degree of participation, it will be for the Irish Free State itself to make its

own choice. It is safe to prophesy that the decision will be a decision of reasoned policy and not a decision of sympathetic and enthusiastic impulse. The tragic figure of John Redmond stands as a warning for all. The two great parties in the Irish Free State to-day are twin branches of Sinn Fein, and they do not forget. Sinn Fein rode to power on the great wave of popular resentment which followed John Redmond's magnificent gesture of uncalculating generosity in 1914 and the betrayal of it that so many had foreseen. John Redmond and his movement perished swiftly and utterly. Even the help that he brought to Britain was coldly ignored. The fruits of the sacrifice which he had bade Ireland make were omitted from the record. The lesson was learned in grief and passion. It will not be forgotten.

These are things to be borne ever in mind when the British Empire is bracing itself to sustain the growing pressure of the new strains and forces about to bear upon it. Britain, *primus inter pares*, is the leader of "the group of self-governing communities" in matters of external policy. Britain has the right and the responsibility of leadership where the preparation for possible war has to be made. The Dominions have the right to confer, to join in consultation and in reaching decisions and to co-operate in action, each according as its own legislature may decide. Common sense pronounces that the greatest collective strength can be attained only by the greatest individual contributions to the common stock of goodwill and pledged purpose, of material force and resources, and of zeal and skill in applying them to the best advantage. Does not common sense equally require that all internal strains and stresses within the Commonwealth structure should be cured and that all minor issues should be subordinated to the imperious necessity for preparing for the struggle for survival? For survival? What else? The philosophy and technique of the new expansionist militarisms on the

mainland of Europe are plain to see. Would defeat in another Great War conceivably leave to "the Community of Nations known as the British Empire" the smallest chance of reconstituting its position? Stripped of colonies, with outlying Dominions captured or driven to seek protection elsewhere, with the financial and economic power of London under alien governance, would the British Empire continue to exist in recognisable shape? . . . It is from Britain, then, that the initiative for a concerted Commonwealth effort must come. It is for Britain to give earnest of the sincerity of her purpose, of the sureness of her aim and method, of a virile determination to exist.

It is the author's belief that there is identity of essential interest for Ireland and Britain in any combination of circumstances pointing to the possibility of another Great War. He is convinced that the genius of the two peoples, diverse in inspiration, in ultimate aim, in immediate method, yet seeks expression on parallel lines of political and cultural growth which should commit them to close alliance for concerted action in external affairs. He believes that the only impediment to such concerted action lies in the exacerbation of spirit and in the weakening of economic power which is caused by the Anglo-Irish conflict. Were it happily adjusted all else might follow. But if it be not happily adjusted. . . . It is unwise to prophesy about Ireland. But it can safely be said that Ireland, in that event, will be a source of embarrassment and not of strength if war comes. No responsible Irish leader will try to bind and hold Ireland to a line which she feels to be inconsistent with her national right, her pride and her passion. None will try, for none could do it.

In the following pages will be found a brief study of the present position of the Anglo-Irish dispute from an independent Irish standpoint. It is offered in the hope that a clear outline of the salient issues presented with adequate documentation may lead to a clearer comprehension of the

general merits than is possible for a public whose knowledge of the subject is almost exclusively derived from controversial statements of a single complexion. The Anglo-Irish Treaty is taken as the touchstone by which to separate the genuine from the spurious. And the policy which inspired the Treaty is accepted as the policy which should regulate the relationship of the two countries at the present juncture and for the future. It may be that candour of expression can in places cause a certain discomfort to sensitive readers, but perhaps they will pardon the roughness for the sake of the sincerity that is behind it. For the Author is sincerely anxious that the Anglo-Irish conflict shall be brought to an end in order that both countries may concentrate their attention upon the vastly greater interests which are in issue in the world arena.

CHAPTER II

IRELAND'S WAR RECORD 1914-18

(a) *Its Relevance To-day*

ALL consideration of the relations which subsist between Britain and the Irish Free State, all designs for their improvement, all reasoning underlying the shaping of policy for their future regulation, must have regard not merely to fine sentiments and sounding phrases but to a realistic appreciation of fundamental and structural factors. It is necessary to examine the gauges which show the quantum of force actual and potential, material and immaterial, which is to be disposed of. What power in the form of facts, values, amounts, tendencies do the statistics register? We must look to the past in order to fix our landmarks for steering a course into the future.

There is as little doubt in Dublin as there is in London that in ordinary peace time it behoves the interests of both Britain and Ireland that not merely peaceful but definitely friendly relations should exist between the two countries. Still less is there any doubt in either capital that if another Great War should come—and the Empire be involved in it once more—it is above all things desirable that there should be mutual confidence and understanding, whether or no there be combined efforts, between the Irish Free State and Great Britain. Neither can be seriously injured without the damage reacting to the detriment of both. They are linked by a thousand interwoven ties in spite of the diversity of their several national idealisms. Their populations comprise large numbers of a common stock—of mixed race, partly Irish and partly British by tradition and culture

and loyalty and aspiration, partly overlapping, partly interpenetrating both peoples in a fashion which forbids all attempt at dissection or amputation. Their respective economies are complementary rather than competitive. Their respective polities are, or should be, in process of settling down amicably with all root stocks of bitterness finally extirpated. There is scope for each to develop freely on its own lines. Their combined strength is infinitely in excess of their several strengths if they are held asunder by petty feuds, or stale animosities, or unquenched suspicions. Combined they would be strong. Divided they are the weaker by more than twice the force of the lesser nation. In other words, if Britain were at war and if Ireland were estranged and aloof, Britain would have to hold more than the equivalent of Ireland's strength immobilised in a reserve, lest aloofness give place to hostility. There can surely be no question anywhere amongst intelligent people that the wise policy for both, in face of the prospect of possible world struggles, is the cultivation of friendly relations ripening into a cordial understanding of mutual interests and policies and strategies. The most successful war efforts are those which are based on the preliminary preparation of peacetime. The most extensive rearmament by land and sea and air is no more important than the psychological rearmament which makes adversaries into well-wishers and neutrals into friends, which heals old wounds and exorcises the hatreds that caused them, which renders possible a shared enthusiasm, a common purpose, a comradeship in arms.

No doubt there are here and there some trouble-mongers who are more concerned with pursuing their grudge than with any ideal of morals or high policy. It is necessary to be fore-armed against such as these. And it is equally necessary to guard against the ignorance and the prejudices which decades of political conflict and of an embittering propaganda have created and intensified. Nor should it be for-

gotten that there are some who profit by Anglo-Irish conflict or whose vested interests and personal careers depend upon its continuance. Against all such as these the sovereign remedy is the truth—facts which tell their own tale, the reasoning which the facts unquestionably support and the guiding principles of demonstrable moral and rational cogency to which they point. Let us put some facts into evidence and let them tell their own tale.

(b) *The Truth and its Eclipse*

What was the part played by Ireland in the Great War?

The answer is that Ireland made a most notable contribution to the war effort of the United Kingdom of Great Britain and Ireland (as it then was) in men, money and food supplies. It is an answer which will surprise many.

Circumstances have conspired with the ill-wishers of Ireland to deprive her of the credit of her pro-Ally enthusiasm with which the bold lead of her Nationalist leader, Mr. John Redmond, M.P., in 1914, inspired her. Official records and the fact of the Anglo-Irish struggle of 1916 to 1922 have contributed to conceal her achievements. The ardour of Nationalist Ireland was systematically thwarted by the British authorities in all the earlier stages of the war, as is shown in fully documented detail in the biographies of Mr. John Redmond.¹ Her recruiting figures were habitually misrepresented. Her war service was ignored. In the early post-war years the catch-cry in England was that "Ireland took no part in the war," and "all Ireland did in the war was to stab England in the back": it is, indeed, the staple reproach of much anti-Irish propaganda down to the present day.

Yet Ireland contributed some 7·28 of her total population on a basis of purely voluntary—unconstrained and actually

¹*John Redmond's Last Years*, by Stephen Gwynn.

Life of John Redmond, by Denis Gwynn.

discouraged—enlistment to the United Kingdom's fighting forces. And this is a percentage rarely if ever exceeded by any country where all elements of compulsion were absent and it was no question of resisting invasion.

(c) Ireland's Contribution to the Empire War Effort

Ireland's contribution to the war effort of the United Kingdom of Great Britain and Ireland comprised:—

- (a) Men bearing arms. The dead. The survivors.
- (b) Foodstuffs, etc., supplied.
- (c) Money and credit furnished.

Before proceeding to the facts, however, there are certain points to be noted in order that their true significance may be appreciated.

It is noteworthy that British official statistics are almost entirely barren of any direct record of Ireland's war service. The roll of Ireland's dead and the record of surviving Irish ex-Servicemen have had to be drawn from other sources. The tale of Irish contributions of money and credit and of food supplies is not an official record but is based on matter gleaned here and there from official publications.

In considering Ireland's war record for 1914-18 for the purpose of estimating her actual and potential resources in view of a possible future war it must be remembered that the Irish Free State¹ having been partitioned is now less than the old Ireland. It is less by the Six Counties (out of the nine Counties of Ulster) which are now comprised in Northern Ireland. Its population is, therefore, the smaller by some two-sevenths than its war-time population. It is important, consequently, in considering the figures for the past, to treat the Northern Ireland area and the Irish Free State area separately as far as possible in

¹ Ireland, by virtue of the Anglo-Irish Treaty, became the Irish Free State subject to the reservation of a right, which was exercised, for the Six Counties of Northern Ireland to exclude themselves from the Irish Free State.

order to facilitate calculations for future purposes on the new basis of population and area.

(d) *Men Bearing Arms*

(i) *The Dead*

In the British Museum may be found *Ireland's Memorial Records*—a work in eight volumes which contains a nominal roll of 49,400 Irishmen who fell in the Great War. It is not a complete list. But it is as complete as its compilers were able to make it having regard to the circumstances. *Ireland's Memorial Records* were prepared by the Irish National War Memorial Committee under the Presidency of Field Marshal The Earl of Ypres—better known, perhaps, as Lord French—who in 1919 was Lord Lieutenant of Ireland. It contains a Foreword by the Earl of Ypres and an introduction (on behalf of the Committee) which tells, amongst other things, how it secured full data from the Army authorities but was unable to do so from the authorities concerned in regard to the Navy, the Air Force and the Colonial Regiments. A special copy was, in December, 1922, presented to H.M. King George V, and was by him deposited in the British Museum. There are a few other copies in existence in libraries and in Service institutions.

The significance of *Ireland's Memorial Records* is emphasised by Lord Ypres' Foreword (dated 28th December, 1922) in an eloquent passage:—

“Ireland weeps over the loss of her gallant sons, but shining through her tears we see the pride and glory which she feels that through their sacrifice and devotion her splendid war record goes down to posterity untarnished.

“When the true history of the Great War comes to be written and understood the part taken by the soldiers of Ireland will stand out in brilliant relief. In the days

of the First Expeditionary Force, at the Marne, on the Aisne, at Ypres and throughout the time during which the 'Contemptible Little Army' was holding back the German hosts, the Irish soldiers were always to be found where the strife was hottest. Irish regiments stood their ground against terrific odds with a tenacity which has never been surpassed in war.

"One battalion of the far-famed old regiment which bore the time-honoured name of 'The Royal Irish' was practically wiped out in as gallant a stand as history records.

"Later on, there came the specially raised reinforcements which so splendidly maintained the record of Irish soldiers up to the final victory.

"When each and all of the self-governing Dominions of H.M. the King, Canada, Australia, New Zealand, South Africa, Ireland—come to sum up and compare the part they have taken in building up the British Empire what a share may Ireland rightfully claim!

"These sacred memorial volumes form a valuable part of her charter to that claim."

Lord Ypres, who had in 1914-15 commanded the First Expeditionary Force, to which he refers, could describe with authority the quality of Ireland's soldiers. Writing as he did when the Irish Free State was in being and its Constitution adopted, he claimed for Ireland, the new Dominion, a full share in war service which need not shrink from comparison with that of any other of the new co-equal nations. Of the number of Ireland's war dead we know that the Roll contains 49,400 names. We know, too, from the face of the record that it is not complete—and we know why. It is perhaps sufficient to say that the total certainly exceeded 50,000.

The following table (prepared by *The Economist Intelligence Service*) gives the numbers of *War Dead* for Ireland, Great Britain and the Dominions and shows them as percentages of the respective total populations:

BRITISH COUNTRIES—POPULATION AND WAR DEAD
(Thousands)

<i>Area.</i>	<i>Estimated Population, 1914.</i>	<i>Estimated¹ Total War Dead.</i>	<i>War Dead as Percentage of Population.</i>
Great Britain . . .	41,689	762	1·80
Ireland	4,376	50	1·14
Canada	8,075	62	0·76
Union of South Africa	6,323	9	0·14
Australia	4,872	61	1·25
New Zealand	1,085	18	1·66
India	315,086	15	—

¹ Estimates of the numbers of War Dead have been subject to frequent revision and the figures in this column should therefore be regarded as only a reasonable approximation.

N.B. The latest estimate of the Imperial War Graves Commission (1933) puts the total Empire war dead, including South African native followers, etc., at 1,104,890.

(ii) The Survivors

No trustworthy official record can be obtained from any source of the total numbers of Irishmen who served in the United Kingdom forces, whether enlisting during the war or previously enrolled. But very valuable evidence of a secondary character has been made available. It is undoubtedly authentic and trustworthy. And it is expedient that it should be much more widely known than it is. The figures are most striking—as well for their size as for their distribution. And they appear to supply a complete justification for the criticisms so often heard in Ireland during and after the war which reflected adversely upon the accuracy of the Irish recruiting figures and indeed upon the *bona fides* of certain influential people who were concerned in their publication. Before proceeding to scrutinise them it is appropriate to consider one major example of error and misrepresentation which, from 1916 onwards, tended to mislead British opinion and to warp

British policy towards Ireland, and which did much at the time as well as later to embitter feeling between the two countries. Statistics officially prepared and published in 1916 represented Ireland as having a large number of men of military age who had refused to join up. The largeness of this number was urged as a proper ground for imposing conscription. It is to be remembered, however, for the purposes of what follows, that conscription was not enforced. The Statement (an official publication, 1916—Cd. 8390) showed, on the basis of the Census of 1911, that Ireland had 547,827 men of military age of whom 58,385 (or nearly one-ninth) were in the Dublin Metropolitan Police area. It showed "the number of men who had joined H.M. Forces since the Outbreak of War" at 15th October, 1916, as 130,241, of whom 66,674 came from Ulster: and after providing for indispensables and unfit it deduced a residue of some 160,000 men still available. It is, however, naïvely confessed in a footnote that "the number of reservists who rejoined the colours from the Dublin Metropolitan Police area cannot be ascertained, but it must obviously be added to the number of men who had joined H.M. Forces and a proportionate deduction made from the number still available." The number of 160,000 potential soldiers in Ireland was accepted and used, and the footnote ignored or overlooked. It is certainly unusual to put a positive and substantial misstatement in the text of a formal document and then qualify it by a footnote which avows the misrepresentation. This document furnished the theme for many authoritative comments. Thus "Our Military Correspondent" in a special article in *The Times* on 20th September, 1916, on "Man Power" wrote:—

"All that it is necessary to say about Ireland is that compulsion is a necessity on military grounds if the Irish divisions are to be maintained, and that if we

are not to expect the 150,000 additional men that Ireland could give us, then we must make good the deficit elsewhere. We shall all very much regret the disappearance from our armies of the Irish element, but it is bound to happen unless a change is quickly made. The good-humour, dash and soldierly qualities of the Irish are dearly prized in the Army. They are the finest missile troops that we possess when they are led and officered by Irishmen who understand them; and it will be an indelible stain upon this gifted race if a German war against the liberties of Europe and the integrity of the small nations finds Ireland absent from the roll-call at the end."

Well, there was no conscription enforced. Yet when the end came Ireland—as the following figures will prove—was abundantly represented at the final roll-call. In spite of the rapidly intensified political struggle with Britain from 1916 onwards, Ireland's enthusiasm for the case of "the liberties of Europe and the integrity of the small nations" produced a lavish contribution from her available stock of men of military age. How extraordinarily erroneous were the figures published in the official Statement will now be seen.

The British Legion obtained in 1919, for purposes of its own administration of its own and of official funds, an ascertainment of the number of ex-Servicemen then living in Ireland. This was prepared by the Royal Irish Constabulary, a body with much experience in the collection of administrative statistics, with the full official machinery then at their disposal.

Resident Irish ex-Servicemen numbered 248,000. The British Legion, in furnishing this figure, notes that it does not include the numbers of Irishmen who still continued (in 1919) in the several British services—and that, as the Irish regiments had been demobilised in Great Britain, and not in Ireland, a substantial number of Irish ex-Servicemen obtained employment locally and did not return to Ireland.

It suggests that a conservative estimate of the number of Irish ex-Servicemen thus to be added to the total of resident Irish ex-Service men would be 20,000. Adding the Irish dead the British Legion (Irish Branch) estimates a total of *not less than* 320,000 Irishmen serving in the Great War in the British Imperial Services. The following table sets out the figures and the provinces from which they were drawn. A simple calculation adjusts the number of ascertained Ulster ex-Servicemen (in 1919) as between the three Ulster counties comprised in the Irish Free State and the six Ulster counties of Northern Ireland in the ratio of their respective populations. In the ratio of the results so obtained, the total war dead and the estimated 20,000 above referred to are attributed to the Irish Free State and Northern Ireland. The totals thus arrived at are for the Irish Free State area 255,000 and for Northern Ireland are 63,000.

IRISH EX-SERVICEMEN IN 1919

1. Resident in Ireland.

(As ascertained by the Royal Irish Constabulary at the instance and for the purposes of the British Legion in Ireland.)

Ulster (nine Counties)	62,000	
Munster, Leinster and Connaught (twenty-three Counties)	186,000	
	<hr/>	
	248,000	248,000

2. Resident outside Ireland.

(Estimate of the British Legion in Ireland.)

(a) demobilised in Britain and employed there	
(b) still serving in H.M. Forces in 1919	20,000
	<hr/>
	268,000

Adjustment

(as between the Irish Free State and the Northern Ireland area.)

The total population of Ulster (census 1911) was:—	
Six Counties of Northern Ireland	1,250,531
Three Counties (Cavan, Donegal and Monaghan) now in the Irish Free State	331,165
	<hr/>
	1,581,696

IRISH EX-SERVICEMEN IN 1919—*Contd.*

Apportionment of the ex-Servicemen (1919) of *Ulster* in the ratio of the respective populations of the *Six Counties* and the *Three Counties* shows 49,000 and 13,000.

Ex-Servicemen resident in Ireland in 1919.

Northern Ireland (Six Counties)	:	:	:	49,000	
Irish Free State (Twenty-Six Counties)	:	:	:	199,000	<u>248,000</u>

Apportionment of the ex-Servicemen (1919) resident outside Ireland in the ratio of the numbers of ex-Servicemen (1919) resident respectively in the Northern Ireland area and the Irish Free State area shows 4,000 and 16,000.

Apportionment of total Irish war dead in the ratio of the numbers of ex-Servicemen (1919) resident respectively in the Northern Ireland area and the Irish Free State area shows (not less than) 10,000 and 40,000.

*Adjusted Figures: Totals.**Total Irish Contribution to H.M. Forces in War (1914-18).*

					<i>Percentage Population.</i>
<i>Northern Ireland area:</i>	1. War dead	10,000			
(Population:	2. Resident (1919) ex-				
1,250,531	Servicemen	49,000			
Census 1911)	3. Non-resident (1919)				
	ex-Servicemen	4,000	63,000	5.0	
<i>Irish Free State area:</i>	1. War dead	40,000			
(Population:	2. Resident (1919) ex-				
3,139,688	Servicemen	199,000			
Census 1911)	3. Non-resident (1919)				
	ex-Servicemen	16,000	255,000	8.1	

No one has less desire than the author of this book to misprize or undervalue the war effort of that part of Ulster which is now Northern Ireland. The gallantry of the Ulster Division was proved to demonstration at Thiépval and in many another fight. In fine weather and in foul, in victory and in repulse, they played their part alongside of their Nationalist fellow-countrymen, displaying the fighting qualities which are the common heritage of all of the stock from which both alike are drawn. But theirs was the happier lot. Their numbers of voluntary soldiers were not concealed. Their achievements and sacrifices were not ignored.

It is necessary for the purpose of this book that the truth should be told about the war effort of that part of Ireland that is now the Irish Free State. It was a wonderful effort. Where Northern Ireland contributed five per cent of its total population, Irish Free State Ireland contributed more than eight per cent. And what was done in 1914-18 might, if circumstances can be rendered favourable, possibly be repeated. To this end it is necessary to demonstrate how valuable a helper to Britain Ireland, Nationalist Ireland, has been—not to elicit a belated gratitude but to open the eyes of some in high places in Britain who, purblind from prejudice, are doing their best to ensure the absence of that helper in the troubles that are to come.

And let it be remembered by those who find Ireland uneffusive in Commonwealth enthusiasms that one of the difficulties to be surmounted is the memory of 1914-18—of help generously offered and spurned, of other service accepted and afterwards denied, of sacrifices and triumphs unrecognised or appropriated by others. Ireland does not forget her soldiers of the Great War. Nor does she forget what happened. She has learned her lesson. Generosity relying upon honour failed of its due fruit. This time it must be prudence relying on carefully calculated plans.

(e) Supplies Furnished

Not the least valuable service to a belligerent in war-time is the provision of food supplies. This was conspicuously so in the case of Britain in the Great War when the shortage of food supplies, due to the activity of enemy submarines and commerce raiders, brought her to the very verge of disaster.

On this head also it is to be observed that British official statistics are almost entirely silent as to the large extent to which Britain was able to profit by the agricultural

resources of Ireland. Sufficient, however, has been found in the published records of the Department of Agriculture in Ireland, when still under British control, to show the important and indeed vital assistance which Ireland gave to Britain in regard to food supply.

It will be seen from the following table p. 33, that Irish exports of foodstuffs to Britain during the war exceeded in amount those of every other country in the world save the United States of America. They exceed those of the Argentine and of the several Dominions and of India. The figures, indeed, rather understate Ireland's contribution, for there are two principal factors of modification:—

- (1) The Irish figures give the value (f.o.b.) before shipment to Britain, whereas all the other figures give the value (c.i.f.) *after arrival* in Britain. To obtain a true comparison there should be added to the Irish figures the not inconsiderable (especially in war-time) cost of freight and insurance.
- (2) The Irish figures represent shipments to Britain; and take no account of possible re-exports by Britain of the supplies so received. Such re-exports would be negligible during a period of British war-time food-shortage. On the other hand, figures from overseas countries represent imports into the United Kingdom and consequently include a not unsubstantial proportion of such imports as directly or indirectly reached Ireland for Irish consumption.

Apart altogether from considerations of volume and cost, a special value attaches to Irish supplies owing to the proximity of their source. The short sea passage from Ireland can be kept as safe as was the passage of transport and supply ships between Southampton and Le Havre in the Great War, whereas the assurance of trans-oceanic supplies, apart from monetary cost, throws an immense and possibly an almost insupportable burden upon the British Navy.

BRITISH IMPORTS OF FARM PRODUCE, FOOD AND DRINK
(£ thousands)

<i>Item.</i>	1914.	1915.	1916.	1917.	1918.	1919.
Exports from Ire- land . . .	41,607	48,549	62,577	71,801	78,254	93,709
Exported to the United King- dom from:						
U.S.A. . .	51,289	95,983	133,068	158,009	251,742	242,308
Argentina . .	29,569	51,802	40,359	38,207	51,236	61,745
Canada . . .	24,649	29,559	45,432	57,840	61,474	74,958
British India .	13,775	23,890	21,497	22,845	38,342	22,323
Denmark . .	24,517	21,639	20,980	17,284	3,895	7,864
New Zealand .	11,106	16,034	17,606	15,526	16,033	25,543
Netherlands .	17,413	14,431	14,395	15,093	4,888	11,565
Australia . .	16,127	11,797	10,240	26,090	16,988	36,183
Russia . . .	12,632	8,610	660	119	4	905

This table is extracted from a *Report on the Trade in Imports and Exports at Irish Ports during the year ended December 31st, 1919* (Cmd. 1105).

(f) *Money and Credit Contributed*

During the whole of the Great War, Ireland formed a portion of the United Kingdom of Great Britain and Ireland and her revenues were received into the United Kingdom Exchequer and were administered by the British Treasury. Irish revenue and British revenue were thus applied to Empire war expenditure on joint account until a separate Irish Exchequer came into being as a result of the Anglo-Irish Treaty of December, 1921. Upon the separation of the two exchequers the Irish Free State undertook a proportionate liability in respect of the Public Debt and War Pensions as then existing of the United Kingdom. This liability was ultimately (Agreement of December, 1925) extinguished as part of agreed arrangements leading up to an Ultimate Financial Adjustment between the two countries and in view of certain credits claimed by and admitted to be due to Ireland in the accounts of the dissolved partnership.

It is possible thus to give roughly approximate figures, based upon British official figures, for Ireland's monetary contribution to the prosecution of the Great War. Irish revenue 1913-14 stood at £11,134,500. In 1919-20 it had risen to £50,615,000. And in 1920-21, in the throes of the Anglo-Irish struggle, it still stood as high as £48,843,000. Of these amounts, according to the British Treasury, a sum of upwards of £82,900,000 was made available for Imperial expenditure. The following table—summarising the British Treasury figures—gives the yearly amounts and the sums applied to Local Expenditure. It should be pointed out, however, that Irish publicists, official and unofficial, have always questioned the basis upon which these and other similar returns were habitually compiled on the ground that Local Expenditure was unduly stretched to include Imperial items with the effect of unfairly diminishing Ireland's apparent available surplus for Imperial purposes. Thus, *exempli gratia*, the full cost of the Royal Irish Constabulary was of recent years charged as Local Expenditure, whereas it was claimed to be an armed, semi-military force employed for the Imperial purpose of holding Ireland in subjection; and, similarly, Bread Subsidy in war-time, so far as spent in Ireland, was charged not as an Imperial war-time outlay, but as Local Expenditure. Whatever view may be taken of such contentions, the undisputed total of *Ireland's revenue contribution* for the seven year period is not less than £83,000,000.

The total of *Ireland's capital contribution* was never definitely ascertained and agreed. But the British Prime Minister told the House of Commons in December, 1925, that the British claim against the Irish Free State in that regard amounted to £155,000,000. This was "a preliminary claim as a basis of discussion."

It is convenient to proceed by direct quotation of the Prime Minister's speech. Mr. Baldwin said:—

"But this claim was subject to abatement—there we enter into the region of hypothesis and very difficult calculation in respect of the value of British assets¹ connected with the public debts, including the proper share of the Free State in our claims against the Allies and Reparation Receipts, and also subject to discussion of the Free State counterclaims² under Article V of which we have no concise knowledge. And in default of agreement the matter was to be settled by arbitration. . . . In consideration of the abrogation of this undetermined liability, if it be a liability, under Article V, the Free State have now undertaken to bear full liability for compensation for material damage done in the Free State area since January, 1919, and to repay to the British Government the amounts which this Government has paid, or is still liable to pay, under the previous Agreements."

And certain other minor monetary terms in addition. The arrangements thus indicated were embodied in the Ireland (Confirmation of Agreement) Act, 1925, which ratified the agreement between Great Britain, the Free State and Northern Ireland dealing with these and other matters.

It is thus seen on the basis of British official figures that:—

- (1) Ireland's revenue contribution was not less than £83,000,000.
- (2) Ireland's capital contribution, as estimated by the British authorities in 1925, was £155,000,000.

These figures may fall short of, but they certainly do not exceed, the truth. Reasons already alluded to exist for thinking that the revenue contribution is less than

¹ Such as the Suez Canal shares held by the Government, ships and war stores, including food and munitions, of which vast stocks remained unexpended and awaiting gradual liquidation.

² Largely in respect of prolonged and systematic overtaxation, as established by a celebrated Royal Commission appointed by Mr. Gladstone which reported in 1896.

rectified accounts would have shown. And the capital contribution is the capital contribution of the Irish Free State area alone. For Northern Ireland remains liable to the British Exchequer for a certain undivided and unmeasured share of the British public debt. There is no ready measure for apportioning Ireland's revenue contribution; but the Government of Ireland Act, 1920, measured the contributory power of Northern and Southern Ireland for such purposes at 44 and 56 per cent, respectively, of the total. On this basis, Northern Ireland contributed £36,520,000 of the £83,000,000, and the Irish Free State area £46,480,000.

CHAPTER III

BRIEF OUTLINE OF THE ISSUES IN THE PRESENT ANGLO-IRISH CONFLICT

(a) How it was Started—The Disputed Payments

It is a paradox of the present Anglo-Irish situation that, although it is abundantly clear to everybody that a conflict between the two Governments exists, there is comparatively little agreement anywhere as to what the active measures taken on either side amount to or as to the precise concessions which either Government is seeking to exact from its opponent. A baffling obscurity envelopes everything. The originating causes of the war, its development and continuance, its methods that involve a rivalry in self-inflicted economic waste, the merits of the dispute swathed in the illusive propaganda of controversy, the final objective, never clearly indicated, ever receding into the background—all these things make a trouble difficult for the peoples most affected to understand. It is, however, beyond all things expedient that the peoples on either side should understand. For without understanding there can—is it not natural and intelligible?—be no common understanding or good understanding between them. It is the author's conviction that in a clear understanding of the facts lies the open road to peace.

In 1932 the Irish Government informed the British Government that it proposed to discontinue certain annual payments which had previously been made and also that it purposed to ask the Irish Legislature to introduce certain amendments into the Irish Constitution. The British Government contested the right of the Irish Government

to do either. The Secretary of State for the Dominions, Mr. J. H. Thomas, contended that the Irish Government was precluded from doing what it proposed by the provisions of the Anglo-Irish Treaty of 1921 or by other contractual obligations of an equivalent authority. The Irish Government rejoined that it was acting within its legal and moral rights, and it offered as regards the disputed payments, which it was retaining to the credit of a suspense account in its own Exchequer, to join in submitting the case to arbitration. The British Government accepted arbitration in principle but stipulated that the personnel of the tribunal should be restricted to British subjects. The Irish Government refused to accept this restriction. Thereupon the "economic war" ensued. Britain proceeded to levy special tariffs upon imports into Britain of Irish foodstuffs and, in particular, of live cattle, with the expressed object of recouping her Exchequer the full amount of the payments that were being withheld. The Irish Free State responded with a series of duties upon British imports into Ireland with the avowed object of completing her fiscal protection of her home industries and of diverting, as far as possible, to foreign markets the purchases she had been wont to make in the British market.

(b) *Political Motives as Well*

It is neither unreasonable nor unfair to look behind the assurances of British Ministers at the time that the sole object of the Irish Free State (Special Duties) Act, 1932, was to enable the Treasury to preserve Budgetary equilibrium without the levying of additional taxes on the general taxpayer. That was an intelligible reason during the financial year 1932-33, but surely not after a new Budget was being framed. On the other hand, there was never the slightest doubt from the outset that these special duties would operate with penal effect. There were

in Britain a great majority that thought, and some that wished, that they would operate with paralysing effect—so that they would prove irresistible. No one who has followed the parliamentary debates on Irish affairs at Westminster can have missed the allusions, from time to time since the Treaty of 1921, to the compelling force which Britain had to her hand in the form of fiscal pressure, if she wished to exert it. There can be no doubt that there was the further object of enforcing upon Ireland a British interpretation of the Treaty, in regard to matters which were already, or might soon be, in controversy between them. The Chancellor of the Exchequer, Mr. Neville Chamberlain, indeed has frankly avowed on more than one occasion that although the conflict primarily related to the withholding by Ireland of the disputed payments, “it is really a political dispute,” or rather “an incident in a political dispute.”

A further blow—and unquestionably a most telling one—was aimed at Ireland at the very outset of the conflict. The despatches addressed in 1932 by Mr. J. H. Thomas to Mr. de Valera laid great stress upon the sanctity of the Treaty and the honourable obligations involved in the keeping of agreements. And as matters came to a head the Irish Free State was widely stigmatised as having made “default” and as refusing to abide by its honourable engagements. So far was this pushed that it was announced that, at the ensuing Imperial Economic Conference at Ottawa, Britain would enter into no agreements with Ireland inasmuch as the latter did not keep her pledged word. It was a shrewdly calculated blow, for it separated the Irish Free State from the other Dominions in the ensuing trade negotiations. And it enabled Britain to excuse the apparent inconsistency of combining elaborate consultations and arrangements for building up and strengthening the economic inter-dependence of the Commonwealth with the simultaneous prosecution of a

destructive trade war against one of the Dominions that formed part of it. It did even more than this. It tended to introduce a wedge between the overseas Dominions and the Irish Free State, and to deprive Ireland of their moral support in constitutional issues. Only two years before, as will be seen, at the Imperial Conference of 1930, the overseas Dominions had unanimously supported Ireland against a British proposal to deprive her of the benefit of the Statute of Westminster and had constrained Britain to adopt their view. What overseas Dominion would be willing now to support a defaulter—a State that repudiated its honourable engagements?

(c) *The Progress of the Conflict. Stalemate*

The conflict thus begun still continues. It has been mitigated by what was known as the Coal-Cattle Pact of 3.1.1935 whose duration of one year was extended for a further year in 18.2.1936. The substance of the transaction, which was described by Mr. J. H. Thomas, the Secretary of State for the Dominions, as a "gentleman's agreement," was that the penal duties should be relaxed on either side to a limited and balanced extent—the value of £1 million to £1.25 millions—in regard to the coal and the cattle that Britain and Ireland respectively badly needed to exchange with each other. This tempering of the rigours of the fiscal hostilities was due—apparently—to the not unnatural protests of economists, traders and unemployed against the widespread losses and hardship created by the "Beggar-My-Neighbour" method of conducting the campaign.

The Economist was driven to protest: "But are we really to allow this suicidal 'economic war' to become a permanency? . . . If the British public allows the economic war with the Free State to continue, it does so in ignorance of the magnitude of the issues involved." Whatever the

magnitude of the wider issues the scale of the immediate economic loss may be judged from some broad results. In the first two years the Irish Free State had ceased to be Britain's best customer and had fallen to fifth place on the list. Anglo-Irish trade fell by over £26 millions a year, of which Britain lost slightly more than half plus the freights and insurance on the whole of the vanished trade.

The "economic war" persists. The Coal-Cattle Pacts, in depriving it of some of its sting, have equally deprived it of most of its potency as a method of compulsion. It has, in fact, failed of its purpose. Popular discontent in Ireland instead of wrecking the Government whose policy had brought domestic hardship, rallied in its support, in resistance to what it believed to be an attempt at domination by Britain. Mr. de Valera's position admittedly has been consolidated. And the Irish Free State, having made some progress towards self-sufficiency, is ceasing to rely exclusively upon raising foodstuffs for the British market—a development which as far as it goes, or may yet go, is a weakening of the Imperial position if another Great War comes. Again, the Coal-Cattle Pacts have had a further effect. They rest upon arrangements, well understood and effectively executed, of an informal character—a "gentleman's agreement" was Mr. J. H. Thomas' description. There can be no answer to the comment that by entering into a "gentleman's agreement" for the regulation of the "economic war" the whole case made at Ottawa that Ireland could not be trusted to keep her engagements is made—almost ostentatiously—to collapse. Thus the result of the conflict is a stalemate. Its prolongation—eked out by gentlemen's agreements—can serve no useful purpose. It is still a cause of grave economic loss to both countries. And, necessarily, it leads to estrangements and irritations where the ties of intimate and profitable intercourse alone offer hope for friendly collaboration and consolidated strength against the outside world. It is surely a tragic error to maintain

conditions of economic antagonism with no intelligible end in view.

(d) *The Real Tug of War. The Treaty*

The despatches of Mr. J. H. Thomas in 1932 showed a dual cause of complaint against the Irish Free State Government under Mr. de Valera. There were the disputed payments and the Constitutional Amendments. In the resulting explosion it was the first that acted as the detonator and it was the second that provided the driving force. The disputed payments supplied the reproach that the Irish Free State was a defaulter—a State that did not pay its lawful debts, a State that repudiated its honourable obligations. And that reproach coloured and clouded the atmosphere of controversy which surrounded the discussion as to whether the Constitutional Amendments did or did not involve a violation of the Treaty.

“All is fair in love or war.” The charge of default and of repudiating honourable obligations is, therefore, perhaps permissible as an exuberance of war propaganda. But it is not a proper term, as Professor Berriedale Keith has pointed out,¹ to describe the withholding of moneys under a claim of right coupled with an offer to abide the decision of an arbitration tribunal. What that claim of right was, and is, will be described, from an independent standpoint, in a subsequent chapter. It may be that, whatever their final view of the problem, many British readers will experience a sense of some discomfort at the methods of transacting public business which gave rise to the dispute and at some of the reasoning by which the claim was supported in official despatches.

¹ It is no less impossible, with any regard to fair play, to accuse the Irish Free State of being a defaulter so long as that State offers to submit to the Permanent Council of International Justice issues which, on the British Government's own case, fall to be determined by international and not by municipal law”—*Certain Legal and Constitutional Aspects of the Anglo-Irish Dispute*, April, 1934, London.

The dispute about the Constitutional Amendments is the real dispute. Money claims, whether under admittedly valid, or disputable instruments, are susceptible of adjustment, or, at least, of peaceful treatment whether they be claims by the United States against Britain or claims by Britain against Ireland. The political or constitutional claims are different. They involve much greater difficulties. In the present dispute the quality and purport of the Treaty which brought peace between Britain and Ireland in 1921 are in issue.

(e) *What was the Treaty? Was it a Contract? Or was it an Imperial Statute?*

Did the Treaty Give Dominion Status or did it withhold something?

The Irish case is that the Treaty was an international contract which gave Dominion status and that Dominion status is to be measured by the proceedings of the various Imperial Conferences and by the Statute of Westminster which crystallised their conclusions in legal form. The British case has not been fully or finally formulated. But, so far as it can be gathered from the various authoritative pronouncements on different points and on different occasions, it was until recently that the Treaty must operate by process of Imperial (i.e., British) statute law and that there were implications in it which cut down the Dominion status to something less than what the other Dominions admittedly possess. How seriously this might be made to work out for Ireland may be realised by a series of propositions:—

- (1) The Treaty operates because an Act of the Imperial Parliament gave it the force of law and its provisions conclusively govern the Irish Constitution which also operates as an Imperial statute.

- (2) The Treaty, though it assures Dominion status to Ireland, contains implied limitations which deprive her of some of the powers of that status as enjoyed by the other Dominions.
- (3) In particular, the Treaty precludes the Irish Free State, by implication, from abolishing the provision by which the British Privy Council became the ultimate Court of Appeal from the Irish Courts.
- (4) The British Privy Council therefore is, and must remain, the arbiter with whom the final decision rests upon all questions arising as to the interpretation of the Treaty and as to the validity of the provisions of the Irish Constitution and of all laws enacted by the Oireachtas in pursuance thereof.
- (5) The British Privy Council consisting of Judges appointed and paid by the British Government are in effective control of the Legislature, the Executive and the Judiciary of the Irish Free State, subject only to legislation by the Imperial legislature whose statutes alone operate with sovereign effect.

These propositions indicate in rough approximation what the position was alleged to be before the decision of the Privy Council in *Moore* and the Attorney-General of the Irish Free State (1935 App. Cas.). The Oireachtas had passed legislation abolishing the appeal to the Privy Council. The Privy Council, after a hearing at which the Irish Free State was not represented, held that the Appeal was legally abolished. The grounds of its decision were that the Statute of Westminster, 1931, an Imperial Statute, enabled the Dominions (the Irish Free State being named as one of the Dominions) to pass enactments repugnant to the Imperial enactments and that this enabled the Oireachtas, as a matter of law, to "abrogate the Treaty" and the Constituent Act which "form part of the statute law of the United Kingdom, each of them being parts of an Imperial Act." But the Privy Council gave a broad hint that the action of the Oireachtas had been inconsistent

with contractual obligations binding the Irish Free State under the Treaty.

Mr. J. H. Thomas, Secretary of State for the Dominions, stated in the House of Commons the Government view¹ that though the Irish Free State was *legally* entitled to do what it had done in regard to the Privy Council appeal, it had had no "moral" or "constitutional" right to do so.

It is to be noted that this hearing merely involved a consideration by the Privy Council of the question whether the right of appeal had or had not been validly abolished by an Act of the Oireachtas. It is further to be noted that although the Irish Free State, having by statute abolished the right of appeal, was not represented at the hearing, the Privy Council did not confine itself to dismissing the appeal as incompetent, but pronounced without qualification upon the effect of the Treaty as affecting the constitutional position of the Irish Free State in its relationship with Britain. It received, it is true, the assistance of the Attorney-General, who attended as *amicus curiae* to state his view, which was in effect adopted by the tribunal. But there is always the risk of an incomplete survey of the full argumentative field in an *ex parte* hearing of this character. In this case there certainly appears to have been a *lacuna* in the judgment of the Court which did not advert to and did not seem to have been aware of at least one argument of high importance from the Irish standpoint which—if considered—might well have resulted in transforming its *ratio decidendi* whilst preserving the decision itself intact.

However this may be, the view of the Privy Council was accepted in British Governmental circles as an authoritative exposition of the whole constitutional position. Mr. J. H. Thomas, who had previously characterised the Acts of the Oireachtas as violations of the Treaty, now framed

¹ Special leave to appeal was granted and subsequently the Oireachtas passed legislation (with retro-active effect) abolishing the right of appeal. The hearing related to the competence of the appeal.

his thesis in the amended form that, though what had been done had been done in pursuance of a legal right, yet there had been no "moral" or "constitutional" right to do it.

Thus the doctrine that the Treaty derived its force and effect solely from being embodied in an Imperial Statute, and could be enforced by legal process in the Courts under the supervision of the Privy Council, perished—almost still-born. The Treaty thereupon reverted to its original position as a contract unenforceable save as a matter of moral or honourable obligation. The change is not without importance. A contract must be interpreted with due regard to certain moral conceptions arising out of the attendant circumstances and the relationship of the parties. Statute law is a thing imposed and its express terms prevail. Whilst it is true that the intention should receive effect in either case, there may be obvious distinctions to be drawn in interpreting the intention of a contractor in making a voluntary bargain and the intention of a sovereign legislature in imposing its arbitrary will.

And again, if the Treaty had no force or validity except in so far as it derived them from an Imperial statute—and legally that statute can be amended by the Irish Free State—what moral or honourable obligations can remain to inhibit the exercise of that legal power? The difficulties inherent in this dualism of the British case are very obvious. In bald terms it would appear first to have denied the authority of the Treaty as a treaty and thereafter to have set up the authority of the Treaty in order to escape from the consequences of its own considered act in agreeing to and enacting the Statute of Westminster.

But the crucial questions remained: What did the Treaty in fact do? And was it in fact an international agreement or not? The Constitution and its provisions are of less importance as the Treaty is admittedly the dominating instrument.

In short, the principal issue underlying the obscurities of the present Anglo-Irish conflict is whether the Treaty of 1921 did assure to Ireland the full status of a Dominion or whether there were latent in its provisions certain implications which warranted a claim by Britain later on that Ireland, though undeniably a Dominion in name, was not entitled to the same position and rights as the other Dominions. In the following chapters will be found an exposition of the Irish case as seen by independent Irish eyes. It is not, of course, the official Irish case as to which the author is not informed otherwise than by what has appeared in the public Press or in official publications.

CHAPTER IV

DOMINION STATUS

THE strange, silent, only half-avowed warfare which is being waged by the British Government against the Irish Free State will be found to turn principally, if not exclusively, upon the term "Dominion Status." What does it signify?

(a) Its Nature Questioned

When peace was being strenuously sought to end the Black and Tan versus Sinn Fein war in 1921, Dominion status was deemed to provide a formula of sovereign potency which could staunch all wounds, disarm all prides, safeguard all interests, assuage all rancours and surmount all difficulties. It was to be the open sesame to reveal entrancing vistas of peace and joy where lions and lambs should fraternise and the less desirable fauna, such as jackals and hyenas and reptiles, should be unknown. And now, to-day, the trouble is to secure agreement as to what it meant.

This is always the difficulty with brief and compendious formulæ for the solution of the well-nigh insoluble. They tide over the difficulty of the moment. But later each party seems to think that they should be specially interpreted each for its own particular requirements. The present instance as to Dominion status is even more difficult than this. It is complicated by the extremely original plea that Dominion status did not exist at the time when it was formally invoked—and that it did not come into existence until long after the dates when it was, after much deliberation, accepted and applied for the settlement of

the Anglo-Irish dispute of 1920-21. That this is no extravagant account of one controversial standpoint will now be seen. No one will be concerned to deny that in its working out Dominion status presents variations of feature in different cases. But is that not natural in an evolutionary process realising itself under different circumstances? Nor will it be denied that there may be occasional loose ends to which the precise application of the idea is obscure. But that there should be any doubt as to what the essential substance of Dominion status is—at this period of the world's history—or that there should be any possibility of controversy as to when it effectively came into being is indeed extraordinary.

(b) Professor J. H. Morgan: Mr. Winston Churchill

But so it is. Has not Professor J. H. Morgan, K.C., Professor of Constitutional Law at the University of London, categorically pronounced that as late as 1929 Dominion status had no legal or constitutional meaning?

And have we not read that the great authority of Professor Morgan as a constitutional lawyer was invoked in the House of Lords by Lord Danesfort on these very aspects of Anglo-Irish affairs? And are we not aware from his own admission (*National Review*, March, 1936), following Mr. Churchill's disclosure of the fact in the House of Commons in 1935, that Professor Morgan was the expert adviser of "a large and powerful group of Unionist members" who sought to have the Irish Free State deprived of the benefit of the Statute of Westminster when, towards the end of 1931, it was under the debate in the House of Commons? That, in itself, is an eloquent fact. The Statute of Westminster embodied the unanimous decisions of all the Dominions and of Great Britain assembled in the Imperial Conference of 1930 which the Conference had requested the British Parliament to enact. The decisions

themselves represented the result of protracted deliberations which had extended themselves over the proceedings of several Imperial Conferences during the preceding decade. And these decisions were—and purported to be—implementations of and declaratory of the Dominion status long since adopted both as a fact and as a guiding principle. That in these circumstances Professor Morgan should have advised a formal attempt to overrule the Imperial Conferences argues that he was deeply convinced of the correctness of his views and that he deemed the occasion to be of so momentous an importance as to warrant a serious affront to the Imperial Conferences and to the British Governments which had shared and adopted their attitude. That Parliament, in both Houses, should have withstood the pressure which doubtless Professor Morgan's considered advice must have rendered of well-nigh compelling force would seem to indicate that the general body of orthodox constitutional lawyers stood aloof, if not in actual opposition to, his views, and that the National Government of the day shrank from openly breaking faith with the other members of the Commonwealth.

Professor Morgan is unalterably wedded to his views. Their quality is weighted by the depth of his conviction and by the ardour and persistence of his advocacy. It even appears that his teaching in 1931 has durably impressed the versatile and resilient mind of Mr. Winston Churchill. The latter, in reference to the Indian controversy, wrote in *The Times* :

“ . . . the changed meaning of Dominion status becomes dominant. Before the Imperial Conference of 1926 and the passing of the Statute of Westminster, it was a complimentary term which anybody might have applied to any large unit forming part of the Empire. It had no legal or constitutional significance or even implication. The Statute of Westminster attaches more precise and, at the same time, far more grave meaning to the term,

and one which in no way follows from the Declaration of 1917, and in no way relates to any words I used in a speech on a festive occasion ten years before the passing of the Statute of Westminster." (16th February, 1935.)

This drew a response of some severity from Mr. L. S. Amery, M.P., who had been Secretary of State for Dominion Affairs from July, 1925, to June, 1929:—

"This idea that the status of the Dominions was completely transformed by the Imperial Conference of 1926 and by the Statute of Westminster is, of course, all moonshine," (*The Times*, 19th February, 1935.)

a pronouncement which he supported with chapter and verse from the record of proceedings in which he had taken an active official part. Equally telling was another reply from the academic constitutional standpoint, elicited by Mr. Churchill's letter from Professor Coupland, who wrote from All Souls' College, Oxford (*The Times*, 20th February, 1935).

Mr. Winston Churchill does not appear to have returned to the charge. Professor Morgan, however, soon afterwards publicly identified himself with Mr. Churchill's pronouncement in a speech reported in *The Times* (8th March, 1935) which re-stated the point:—

"... in 1917 the term Dominion status in the sense it has subsequently acquired was quite unknown. Even in 1929, when the Viceroy gave his pledge, it had no legal or constitutional meaning."

But he remained silent when reminded (letter, *The Times*, 11th March, 1935) that the Anglo-Irish Treaty of December, 1921, had conferred upon the Irish Free State:—

"the same constitutional status in the Community of Nations known as the British Empire as the Dominion

of Canada, the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa."

and that the Legislature of the United Kingdom, in ratifying the Treaty, had given to its provisions the force of law by express enactment. Statutory recognition and effect as well as constitutional validity had, therefore, been accorded to Dominion status at least as early as 1921-22.

The sequel suggests that the explanation of the paradoxical character of Professor Morgan's legal and constitutional views as thus enunciated is to be found in the warmth of his political enthusiasms. Thus he is later to be found as the leading orator at a meeting of an organisation entitled the Irish Loyalist Imperial Federation on 5th December, 1935. There he proclaimed:—

"that time had justified Lord Carson's conviction that only in the union of Ireland and England lay salvation for Ireland and safety for this country,"

and advocated firmness in refusal by the British Government "even to discuss" certain rumoured proposals for peace so that "Mr. de Valera, who must be getting more and more desperate," would come to London. This cry for the rigours of economic warfare against the Irish Free State is in striking juxtaposition with the main theme of the speakers, that of the things done by the Irish Free State of which loud complaint was being made,

"All that had been done had been done legally and under the Constitution as provided by the Statute."

It seems a legitimate surmise, therefore, that Professor Morgan has been more preoccupied with preventing the Irish Free State from enjoying, or continuing to enjoy, the Dominion status which the Anglo-Irish Treaty conferred

upon it than in applying his undoubtedly great powers to a precise realisation of what that status is and of the circumstances of its application to Ireland.

(c) *Lord Hailsham's Disclosure*

But there is more. The resistance of Mr. Winston Churchill and his "large and powerful group of Unionist members," advised by Professor Morgan, to the passage of the Statute of Westminster related mainly to the position of the Irish Free State. It is true that the resistance was overcome in the end. This group and its friends in the Commons, and in the Lords as well, desired the insertion of an amendment exempting from the operation of the Statute certain aspects of the Anglo-Irish Treaty. They were defeated. But it was made clear that the vanquished had many sympathisers amongst the victors. It was revealed that at the Imperial Conference a similar amendment had been proposed on behalf of the British Government, but that it had been withdrawn in face of the unmistakable disapproval and resentment of the other Dominions. Here is the story as told by Lord Hailsham to the House of Lords during the debate:—

Viscount Hailsham: ". . . With regard to the position of Ireland, it is true that legally we can if we like put in any sort of proviso or restriction. The Imperial Parliament is supreme. But we know in advance that the Irish Free State violently objects."

Lord Danesfort: "Why?"

Viscount Hailsham: "My noble friend asks why. For the reason that I was going to give—that every one of the other Dominions at the Imperial Conference last year supported them in objecting to this. It is not a new point. It was discussed at the Imperial Conference. A suggestion was made that some proviso of the kind should be put in, but no support could be obtained by the Mother Country for that suggestion, because the other

Dominions said, just as the Irish Free State had said: 'You are recognising in this Statute that you cannot legislate for a Dominion except with the consent and at the request of the Dominion. You cannot consistently with that immediately proceed to put into the Statute with regard to a Dominion something which it violently objects to having included.' Every one of the Dominion was equally indignant at that suggestion. Without in the least discussing whether or not that made any difference to the position of the Treaty or any of those legal points which my noble friend asked me about, they said: 'As a matter of principle we object, and we shall resent very much any attempt to limit by Imperial Statute the powers of any Dominion except at the request of that Dominion.'"

This quotation touches the crucial issue—and it touches it at more than one point. Dominion status was recognised to imply national independence. The Irish Free State was recognised as having acquired Dominion status. If Britain had special claims against the Irish Free State by Treaty or otherwise, that was a matter for adjustment by negotiation—even possibly by economic pressure—between the two co-equal partners, but it afforded no excuse for cutting down the statutory recognition of the Dominion status as lawfully and indefeasibly possessed by Ireland. And Britain, at first dissenting, was at length induced to accept and to adopt this view by the expressed resentment of all the other Dominions at her proposal to do otherwise.

Thus we come again to the question: "What was this Dominion status which Ireland got?" And did Ireland in the getting of it lose some of its essential qualities by virtue of the terms of the Treaty which gave it to her?

The answer is, apparently, that on this head Lord Hailsham and his colleagues are at one with Mr. Winston Churchill and his constitutional adviser Professor Morgan. The economic war which Lord Hailsham is still waging is aimed at enforcing Britain's will not only as to the disputed

monies claimed under the aborted Ultimate Financial Settlement of 1926 but also as to the political differences as to how Dominion status as granted by the Treaty should work out. From the very fact of its proposal to exempt Ireland's case from the Statute of Westminster it would seem to be clear that what Britain is striving by economic pressure to force upon Ireland is something which is inconsistent with the Dominion status which that Statute was framed to implement.

It is convenient, therefore, to see what exactly Dominion status is before proceeding to examine how it was made applicable to Ireland by consent and how Britain's present grievance arises and upon what bases of reason and justice it rests.

(d) Its Creation and Essence

The Great War, 1914-18, was at once the cause and the occasion of Dominion status being created.

In the hour of danger and of supreme effort it was realised that if the full forces of the Empire were to be concentrated on a common purpose it must be on a basis of voluntary action by the principal constituent units and not on any basis of constraint by Imperial authority. The British Government was in no position to demand, still less to enforce contributions of men, money or supplies from the principal colonies or dependencies either in virtue of the Royal Prerogative exercised on the advice and at the instance of British ministers or of the legislative authority of the Imperial Parliament which was responsible to the United Kingdom electorate alone. On the other hand, there was a strong consciousness, widespread throughout the Empire, of shared sympathies, of common interests, of identical aims, of the need of each for a combined method to enable all to participate unitedly in effecting a common purpose. A united military effort was swiftly organised—each unit contributing to the extent deemed proper and expedient

by its own Government. Each unit, so contributing voluntarily, soon came by natural and necessary evolution of method to be associated with the supreme direction of Imperial policy. Hence came, on 20th March, 1917, the first Imperial Cabinet, to be followed next day by what was described as its corollary, the Imperial Conference. Collective deliberations by responsible Ministers of the several units for the purposes of warfare led—again by natural and necessary evolution—to a recognition of the need, for immediate as well as for ultimate purposes, for regularising the political or constitutional association of the several units on a basis corresponding to that of their association for warfare. There was no attempt to remodel the organic structure of inter-imperial relations in the midst of the turmoil of war. But the guiding principle was solemnly affirmed and unanimously accepted whilst its application in detail was expressly relegated to the post-war period. There was no possibility of mistaking the meaning of that guiding principle. It was the correlative of the essential nature of the war-time association of Great Britain and the Dominions, just as it was admitted to be the fruit of their willing efforts and sacrifices. It was voluntary association, free and unconstrained, for common purposes on a basis of complete mutual independence and national co-equality. That was the touchstone for application in the detailed working out of the status, as then created, of the Dominions.

Thus was Dominion status born. It was born on the 16th April, 1917. And the select company of nations, upon whom it was then conferred by unanimous agreement, consisted of Canada, Australia, South Africa, New Zealand and Newfoundland, with India on the waiting list. It was heralded as a great step in advance. The chairman of the Imperial Conference that adopted the unanimous resolution decisive of the fact not inaptly referred to "that re-birth of Empire which must be the result of the great struggle."

(e) Official Records of 1917

An authoritative account of the creation of Dominion status can be most conveniently given by offering a series of selected quotations from official records.

The Report of "the Imperial War Conference, 1917" (Cmd. 8566) sets forth certain Resolutions which "were unanimously agreed to by the Conference." Of these it is only necessary to cite No. IX which created Dominion status. This Resolution will be illustrated by quotations from certain eminent statesmen's speeches in the debate which led up to it:

IX

Constitution of the Empire

(Ninth Day: Monday, April 16th, 1917)

"The Imperial War Conference are of opinion that the readjustment of the constitutional relations of the component parts of the Empire is too important and intricate a subject to be dealt with during the war, and that it should form the subject of a special Imperial Conference to be summoned as soon as possible after the cessation of hostilities.

"They deem it their duty, however, to place on record their view that any such readjustment, while thoroughly preserving all existing powers of self-government and complete control of domestic affairs, should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and of India as an important portion of the same, should recognise the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several Governments may determine."

Sir Robert Borden, Prime Minister of Canada, who proposed the foregoing Resolution, expressed the opinion that existing theories and forms could not be continued indefinitely in the future. He spoke of the Crown as "a tie between the Dominions and the Mother Country" and alluding to constitutional reform continued:—

"There has been a very remarkable advance even since we arrived in the British Islands; it is a development which has greatly impressed me, and it seems to be due to the force of great events rather than to any premeditation or design. The fact that an Imperial War Cabinet as well as a British War Cabinet are sitting in London to-day is in itself of great significance. There may be possibly some guidance in that step for the future relations which will give to the Overseas Dominions their proper voice in the great matters which I have mentioned. However, it would be unwise to attempt to forecast. The Resolution which I have proposed does not attempt to do so; it merely proposes that a special Imperial Conference shall be summoned as soon as possible after the war; and it does at the same time place on record the view of this Conference that any readjustment of relations must, in the first place, preserve all the existing powers of self-government and complete control of domestic affairs, that it must be based on a complete recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and must fully recognise their right to a voice in foreign policy and in foreign relations. The willing acceptance of that principle by the Mother Country is an immense stride in advance."

Mr. W. F. Massey, Prime Minister of New Zealand, in a supporting speech said:—

"... Sir Robert Borden when speaking used a term which implies a very great deal. It is a term which I have used myself on more than one occasion, and a term with the use of which I thoroughly agree, and that

is the term 'United Nations.' We are coming together, not, as used to be considered, as the United Kingdom with its dependencies. That is not the position to-day. We are coming together as United Nations of the Empire and on equal terms so far as the populations of the different parts of the Empire will allow."

General Smuts, Minister of Defence in South Africa, was more specific in his support:—

"The whole question of the future status of the Dominions is therefore raised in this Resolution. So far the British Empire has developed along natural lines. The Dominions started as Colonies and as settlements of the Mother Country and of the British Isles. They started as Crown Colonies; they developed into Self-governing Colonies, and now they have become the present Dominions. Other parts of the world have been added to the Empire, until to-day they have really a congeries of nations. These old Colonies and the present Dominions have in course of time increased in importance, increased in population, and in economic importance, and are to-day already playing a part in the world which seems to my mind to make it very necessary that their status should be very seriously considered, and should be improved. Too much, if I may say so, of the old ideas still clings to the new organism which is growing. I think that although in practice there is great freedom, yet in actual theory the status of the Dominions is of a subject character. Whatever we may say, and whatever we may think, we are subject Provinces of Great Britain. That is the actual theory of the Constitution, and in many ways which I need not specify to-day that theory still permeates practice to some extent. I think that is one of the most important questions—one of the most important matters—that will have to be dealt with when this question of our future constitutional relations on a better and more permanent basis comes to be considered. The status of the Dominions, as equal nations of the Empire, will have to be recognised to a very large extent. The Governments of the Dominions as equal Governments

of the King in the British Commonwealth will have to be considered far more fully than that is done to-day, at any rate in the theory of the Constitution if not in practice. That is the most important principle laid down in the second part of this Resolution, that there should be 'a full recognition of the Dominions as autonomous nations.' And to strengthen the point the Resolution goes on to affirm that the existing powers of self-government should not be interfered with."

"... Then if we are to continue as nations and to grow as nations and govern ourselves as nations the great question arises: How are we to keep this Empire together? That is the other important point, I take it, in this Resolution—the point which recognises that there should be effective arrangements for continuous consultation in all common concerns, especially in concerns which are mentioned there specifically, that is foreign policy; but in all common concerns that there should be effective arrangements for continuous consultation."

"... I think, if this Resolution is passed, Sir, we will have taken an immense step forward in this history of the Empire. If we pass no other Resolution at this Conference than this one, I am sure that we will have done a good day's work for this Empire."

"We are emerging out of one era and we are entering upon another where much greater problems will confront us than ever before. So far it has been possible for us each to go his own way, meeting once in so many years. In future it will be necessary for us to keep much more closely in touch with each other.

"These are the principles which are affirmed in this Resolution, leaving the actual solution of our constitutional problem to be dealt with hereafter. Those are the principles which are affirmed here, and I heartily endorse them and give my adhesion to this Resolution as it stands here." *

Sir Robert Borden, in replying, alluded to the summoning of Dominion Ministers to the Imperial War Cabinet and continued:—

"I entirely agree that the step recently taken is a very important advance, because there is but one Crown, but there are many nations within the Empire, and the Crown in its relation to any Dominion acts upon the advice of the duly constituted Government or Cabinet of that Dominion. The Crown at present acts upon the advice of a Cabinet in all Imperial matters, which includes not only Ministers responsible to the British Parliament but also those responsible to the Parliaments and Governments of the respective Dominions so far as they are represented here. The conventions of the Constitution are really its foundation; where there are no written Constitutions, almost everything depends on convention. The great influence of conventions, upon even a written Constitution, may be observed from what has taken place in the United States, where the original terms of their Constitution have been modified by convention in the most remarkable manner and in more than one respect. . . ."

"I entirely agree with General Smuts that, according to the form of the Constitution at present, the conditions are as he suggests. It is to be observed, however, that constitutional writers draw a sharp distinction between legal power and constitutional right. The British Parliament has technically the legal power to repeal the British North America Act—taking our Dominion as an illustration. But there is no constitutional right to do without our assent, and therefore, while there is the theory of predominance, there is not the constitutional right of predominance in practice, even at present. Questions, however, do arise with regard to it from time to time. We have had, even since the war began, a question as to the exercise of the prerogative, and a question as to the advice upon which the prerogative under certain conditions shall be exercised—upon the advice of the Government of the United Kingdom, or upon the advice of the Government of Canada? Doubtless, under present conditions, questions of that kind are occasionally arising, but upon the basis which is established by this Resolution they are less likely to arise in the future."

Enough has been quoted from the Imperial War Conference, 1917, to show what was done and intentionally done, whilst affirming the new Dominion status, to emphasise its essential character. Nor were the designers of the new system at all unconscious of the distinction between legal power and constitutional right and between statute law and constitutional convention. And, for the present purposes, this is of the utmost importance; for the artificers who have had to execute the design have made use of the old materials—the old forms. The Conference's resolution thus embodied an affirmation of constitutional principle of the first order, and it has controlled Imperial and Governmental practice and policy ever since. Its translation into statute law, however, has been effected in part only and at different times, for the legislative shaping of institutions and of organic arrangements in accordance with its terms is by no means complete.

(f) *Official Records of 1921*

The Report of the Conference of Prime Ministers and Representatives of the United Kingdom, the Dominions and India (Cmd. 1474) of 1921 contains further matter bearing upon the nature of Dominion status and its working out in detail. This was the first post-war Conference but, as will be seen, it evaded or postponed the task, indicated for it by the Conference of 1917, of applying itself to remodelling the mechanism of Imperial relations. The reference to constitutional developments since 1917 in its Resolution and certain quotations from speeches during the discussion advance our knowledge of what Dominion status was recognised to be in June, July and August, 1921. The materiality of this will be realised when it is recalled that Dominion status was, in the month of July, 1921, formally offered to Ireland as a basis of peace and was ultimately accorded to her in December, 1921, by the Anglo-Irish Treaty.

The Preliminary Note affords an exemplification of Dominion status in practice:

“The greater part of the proceedings, particularly that relating to Foreign Affairs and Defence, was of a highly confidential character, comparable rather to the work of the Imperial Cabinets of 1917 and 1918 than of the Imperial War Conferences of those years. Other parts, though not so secret in their nature, were intermingled with matter which must for the present be kept confidential. In regard to such discussions only an indication has been given here of their general tenor.”

And again:—

“A precedent created by the Imperial War Cabinet was also revived with valuable results. From 1916 till the Armistice, the Prime Ministers of the Dominions and the Representatives of India frequently sat with members of the British Cabinet to determine the measures necessary for the prosecution of the War. This method of procedure was also adopted by the British Empire Delegation during the Peace Conference in Paris, when all cardinal decisions were taken by the delegation as a whole. In accordance with this precedent, the Prime Ministers of the Dominions and the Representatives of India present in London this year were invited to meetings with members of the British Cabinet called to deal with Imperial and foreign questions of immediate urgency which arose in the course of the sittings.”

And it sets out the terms of the Resolution:—

“XIV. The Proposed Conference on Constitutional Relations.

“Several plenary meetings and several meetings of the Prime Ministers were devoted to a consideration of the question of the proposed Conference on the Constitutional relations of the component parts of the Empire, and the following resolution was adopted:—

"The Prime Ministers of the United Kingdom and the Dominions, having carefully considered the recommendation of the Imperial War Conference of 1917 that a special Imperial Conference should be summoned as soon as possible after the War to consider the constitutional relations of the component parts of the Empire, have reached the following conclusions:—

“(a) Continuous consultation, to which the Prime Ministers attach no less importance than the Imperial War Conference of 1917, can only be secured by a substantial improvement in the communications between the component parts of the Empire. Having regard to the constitutional developments since 1917, no advantage is to be gained by holding a constitutional Conference.

“(b) The Prime Ministers of the United Kingdom and the Dominions and the Representatives of India should aim at meeting annually, or at such longer intervals as may prove feasible.

“(c) The existing practice of direct communication between the Prime Ministers of the United Kingdom and the Dominions, as well as the right of the latter to nominate Cabinet Ministers to represent them in consultation with the Prime Minister of the United Kingdom, are maintained.”

The opening address of Mr. Lloyd George, Prime Minister of the United Kingdom, delivered on 20th June, 1921, dealt with the matter with some elaboration and emphasis:—

“Constitutional Progress of British Empire

“I do not propose to deal in any detail with the agenda for this Conference to-day. We have no cut-and-dried agenda to present. We will discuss that amongst ourselves. The British Government has been under some suspicion in some quarters of harbouring designs against this gathering as a Conference. We are said to be dissatisfied with the present state of the Empire, and to wish to alter its organization in some revolutionary way. Gentlemen, we are not at all dissatisfied. The British

Empire is progressing very satisfactorily from a constitutional standpoint, as well as in other ways. The direct communication between Prime Ministers, established during the war, has, I think, worked well, and we have endeavoured to keep you thoroughly abreast of all important developments in foreign affairs by special messages sent out weekly, or even more frequently when circumstances required. Indeed, at every important Conference either here or on the Continent, one of the first duties I felt I ought to discharge was to send as full and as complete and as accurate an account as I possibly could, not merely of the decisions taken, but of the atmosphere, which counts for so very much. I have invariably, to the best of my ability, sent accounts, some of them of the most confidential character, which would give the Dominions even the impressions which we formed, and which gave you information beyond what we could possibly communicate to the press.

“Ministers of Canadian Government at Washington

“Another change, which has taken place since the war, is the decision of the Canadian Government to have a Minister of its own at Washington—a very important development. We have co-operated willingly with that, and we shall welcome a Canadian colleague at Washington as soon as the appointment is made. We shall be glad to have any suggestions that occur to you as to the methods by which the business of the Dominions in London, so far as it passes through our hands, may be transacted with greater dignity and efficiency, though you will all, I think, agree that the Empire owes much to Lord Milner and Lord Long for their services in the Colonial Office during a period of great difficulty and stress.

*“Asks for Suggestions for Conduct of Empire’s
Business*

“We shall also welcome any suggestions which you may have to make for associating yourselves more closely

with the conduct of foreign relations. Any suggestions which you can make upon that subject we shall be very delighted to hear and discuss. There was a time when Downing Street controlled the Empire; to-day the Empire is in charge of Downing Street.

"On all matters of common concern we want to know your standpoint, and we want to tell you ours.

"Mutual Relationship within Empire"

"I will give you my general conception of the mutual relationship in which we meet. The British Dominions and the Indian Empire, one and all, played a great part in the war for freedom, and probably a greater part than any nation, except the very greatest powers. When the history of that struggle comes to be written, your exertions side by side with ours will constitute a testimony to British institutions such as no other Empire in history can approach or emulate. In recognition of their services and achievements in the war, the British Dominions have now been accepted fully into the comity of nations by the whole world. They are signatories to the Treaty of Versailles and of all the other Treaties of Peace; they are members of the Assembly of the League of Nations, and their representatives have already attended meetings of the League; in other words, they have achieved full national status, and they now stand beside the United Kingdom as equal partners in the dignities and the responsibilities of the British Commonwealth. If there are any means by which that status can be rendered even clearer to their own communities and to the world at large we shall be glad to have them put forward at this Conference.

"India's Status"

"India's achievements were also very great. . . ."

If the concluding passage of this address does not prove that Dominion status had already come into being and

that its essential quality of free, equal and independent nationhood was universally recognised, then language has lost its meaning.

A second inference, no less compelling, is that Dominion status owed its being to the exigencies of the British Empire's war-time struggle for survival and to a prudent desire to preserve and develop it as a source of Imperial strength in time of future crisis. The purport of the references to the war record of the Dominions and of India is unmistakable. They point to the relevance of Chapter II of this book entitled "Ireland's War Record," when the position of Ireland as a Dominion is under consideration. War records bear a twofold aspect. They are a source of pride, sometimes of gratitude, as to the past. As to the future they are an eloquent reminder of what may be again, since it has already been.

Mr. Lloyd George's opening address was followed by a discussion from which valuable light may be drawn to illustrate the position of Dominion status as a thing in being, represented by newly acquired rights in active operation and merely awaiting detailed formulation "in black and white" as one speaker put it in desiring to defer the process. Mr. Hughes, Prime Minister of Australia, who had not been present at the Conference of 1917, took a prominent part.

"Now, amongst the great problems that are to be considered three stand out. You referred to all of them yesterday. They are:—Foreign Policy in general, the Anglo-Japanese Treaty in particular, and Naval Defence. There are other problems, of course, which are intimately associated with these. If we are to give effect to the principle, which I take it has already been accepted, viz.: the right of the Dominions to sit at the Council Table on a footing of equality, and to discuss with you and the other representatives the question of the Foreign Policy of the Empire—these also must be not only considered but settled. I do not think I am misinterpreting

the opinions of all my friends here when I say that this voice, this share, in the Council of the Empire in regard to foreign policy must be a real one, must be one of substance, and not merely a shadow. This involves the creation of some kind of machinery, and here we come to a very difficult position, to which I shall refer very shortly later."

The following passage from the same speaker is especially instructive:—

"Status of Dominions"

"I have nothing further to say on those matters to which you referred yesterday, but reference to one other point may be permitted. It is well that we should know each other's views. We ought not to discuss things in the dark. It has been suggested that a Constitutional Conference should be held next year. It may be that I am very dense, but I am totally at a loss to understand what it is that this Constitutional Conference proposes to do. Is it that the Dominions are seeking new powers, or are desirous of using powers they already have, or is the Conference to draw up a declaration of rights, to set down in black and white the relations between Britain and the Dominions? What is this Conference to do? What is the reason for calling it together? I know, of course, the Resolution of the 1917 Conference. But much water has run under the bridge since then. Surely this Conference is not intended to limit the rights we now have. Yet what new right, what extension of power can it give us? What is there that we cannot do now? What could the Dominions do as independent nations that they cannot do now? What limitation is now imposed on them? What can they not do, even to encompass their own destruction by sundering the bonds that bind them to the Empire? What yet do they lack? Canada has asserted her right to make treaties. She has made treaties. She is asserting her right to appoint an Ambassador at Washington. Are these the marks of Slave States, or quasi-sovereignty? In what essential thing does any one of the great Self-Governing Dominions

differ from independent nations? It is true there is a sentiment, a figment, a few ancient forms; there is what Sir F. Pollock calls the figment of the right of the British Parliament to make laws affecting the Dominions. Supposing the British Parliament should make a law tomorrow which would take from me the very position in which I stand, namely, a representative of a Parliament that exists and was brought into being by a British statute. I suppose that would apply to you, General Smuts, and to you, Mr. Meighen. They could pass that law, and although we might be here as individuals, so far as legal or constitutional status is concerned we should have ceased to exist. But, as Sir F. Pollock says, this power of the British Parliament is a figment, a shadow. Either it must limit our rights of self-government, or it must weaken the bonds of Empire, or it must simply content itself with asserting rights and privileges and responsibilities that are ours already and that none question. In effect, we have all the rights of self-government enjoyed by independent nations. That being the position, what is the Constitutional Conference going to do? . . . The difference between the status of the Dominions now and twenty-five years ago is very great. We were Colonies, we became Dominions. We have been accorded the status of nations. Our progress in material greatness has kept pace with our constitutional development. Let us leave well alone. That is my advice. We have now on the agenda paper matters which mark a new era in Empire Government. We, the representatives of the Dominions, are met together to formulate a foreign policy for the Empire. What greater advance is conceivable? What remains to us? We are like so many Alexanders. What other world have we to conquer? I do not speak of Utopias nor of shadows, but of solid earth. I know of no power that the Prime Minister of Britain has, that General Smuts has not. Our presence here round this table, the agenda paper before us, the basis of equality on which we meet, these things speak in trumpet tones that this Conference of free democratic nations is, as Mr. Lloyd George said yesterday, a living force."

The speech of General Smuts, Prime Minister of South Africa, contained only a brief reference to the subject, but indicated that full discussion of the detailed application of Dominion status was yet to come:—

“I have spoken at length already, Prime Minister, and therefore I do not wish to refer to the other great matter which we are met here to consider, and which Mr. Hughes touched upon, namely, constitutional relations. We shall come to a very full discussion of that subject, and therefore I do not wish to say any more at this stage.”

And Mr. Srinavasa Sastri, one of the three delegates from India, said:—

“We have not yet acquired full Dominion status, but we realise we are firmly planted on the road to the acquisition of that status.”

(g) *New Wine in Old Bottles*

The constitutional position of the self-governing colonies before Dominion status was attained had, for some time, been clearly transitional. The organic structure of mixed law and constitutional convention which contained them resembled nothing so much as a ruptured cocoon from which the chrysalis is about to emerge as a fully developed butterfly. No longer could the vital energy and organic growth that it had once sheltered be suffered to be “cribbed, cabined and confined” within its constricting form now that its ward was attaining to self-sufficient maturity. They had passed from the complete subordination which had been repudiated by the North American Colonies ere they broke away to form the United States of America, to an advanced stage of qualified autonomy. Long since the Royal power of sceptre and orb and sword had been tempered by parliamentary institutions analogous to those of Great Britain. But their Acts of Parliament could be

disallowed by the representative of the Crown at the instance of a British Secretary of State, though of recent years this power of disallowance was, in face of protest, falling more and more into desuetude. Each was theoretically subordinate to the British Legislature which could, and did on occasion, pass laws to bind them—though of recent years only more or less by consent. Their constitutions, though in each case framed in the Dominion, were enacted in British statutes and occasionally, as in the case of Australia, contained large powers of constitutional amendment without reference back to Westminster. The jurisdiction of their legislatures was limited to their own territories and territorial waters. And for a time their laws could be declared by the judiciary to be repugnant to British law, whether statutory or common law, and therefore invalid. To prevent uncertainty and to place a limit upon judicial interference with the legislature, the Colonial Laws Validity Act, 1865, was passed at Westminster which restricted the application of the doctrine of repugnancy to cases where the Colonial Act was inconsistent with an Imperial Act “extending to the Colony to which such law may relate.” As the practice of the Imperial Parliament legislating for the self-governing Colonies otherwise than by consent became rarer such cases of repugnancy tended to become infrequent. In brief, all local rights were theoretically subject to the supremacy of the Imperial Parliament and to the exercise of the prerogative rights of the Sovereign acting on the advice of his British Ministers, but this subordination was progressively tempered in practice to a very substantial degree. Thus, in part by claim and admission, and in part by usage and natural convenience, a certain body of constitutional right or doctrine grew up which rendered the law, as resting upon Imperial statutes, in many cases obsolescent or obsolete, and which rendered the executive practice in the sphere of imperial administration increasingly complaisant towards the independence claimed by the

several units. Form yielded increasingly to substance in everyday practice. But the forms, though growing ever more anachronistic, remained unchanged.

On the other hand, there were numerous ties of common interest to hold them together. And these, it was realised by responsible statesmen, would tend to operate with ever increasing effect if antagonisms resulting from arbitrary exercises of imperial authority were given no cause to spring up. Defence, trade, shipping, finance, copyright, marriage laws, citizenship, religion, literature, political philosophy—these and other subjects were matters on which uniformity of interest and feeling, subject to relatively minor diversities, existed. They were matters, therefore, in regard to which in varying degrees a corresponding uniformity of legal regulation by Imperial statute existed subject to similar minor diversities in treatment. The mechanism of law and regulation and tradition and form and practice which sustained the Imperial structure was both intricate and delicate to a degree that made rough-handling a thing to be deprecated on all sides.

The advent of Dominion status in 1917, therefore, whilst terminating all claim to Imperial authority over the Dominions either in the legislative or the executive sphere, produced numerous problems of delicate adjustment which, if inconvenience and even acrimony were to be avoided, would call for deliberate and careful and precise handling. What Mr. Hughes called "setting down in black and white" the relations between Britain and the Dominions, was a delicate task if it were to be conducted—as was desired—by adaptation rather than by amputation. Mr. Hughes, satisfied in 1921 with the new wine of 1917, was in no hurry to mend the old bottles, which were all there was so far to hold it. But the task, perforce, had to be undertaken lest, under pressure of some sudden crisis, the old bottles might burst.

This "setting down in black and white" proved a formidable task. We may leave aside for special consideration the arrangements of 1921-22 as to the Irish Free State. It required the deliberations of the three Imperial Conferences of 1926, 1929 and 1930 respectively to arrive at certain "declarations and resolutions" to regulate the new position. These, in due course, furnished the subject matter of the Statute of Westminster, 1931.

(h) Statutory Creation of Dominion Sovereignty

The method adopted for giving effect to the decisions is interesting. Thus, where Britain, or more properly the United Kingdom, had heretofore of her own sovereign will and initiative enacted legislation binding upon the Dominions, and was hereafter to do so no more, but instead was to legislate for them, if at all, only at their own request and with their consent, the method adopted for declaring and ratifying and recording that revolutionary change was for Britain to pass legislation enacting that the change shall be made, and to pass it with a recital that the Dominions have severally requested and consented to her doing so. Thus the letter is the letter of the British Act of Parliament but the spirit is the spirit of the unanimous Resolutions of the Imperial Conferences. The underlying authority is not the authority of the Three Estates of the British realm. It is the authority of Great Britain and Canada and Australia and New Zealand and South Africa and the Irish Free State and Newfoundland, jointly and severally acting in concert. This is clear from the Title and Preamble to the Statute of Westminster which by inevitable implication recognise that whilst the Parliament of the United Kingdom may provide the organ by which the law, the legal forms, are enunciated, it is at the Imperial Conferences that what it designates "the established constitutional position" is laid down. Yet the Imperial Conference, as

has been seen, is no Federal Diet exercising delegated powers over all; for the national independence and equality of each is preserved in the methods of Conference and agreement by which alone the Imperial Conference functions.

The Title and Preamble are as follows:—

Statute of Westminster, 1931.¹

“An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930.

(11th December, 1931.)

“Whereas the delegates of His Majesty’s Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences:

“And whereas it is meet and proper to set out by way of preamble to this Act, that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

“And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion

¹ For the text of this Act see Appendix p. 343.

otherwise than at the request and with the consent of that Dominion:

“And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

“And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained:”

In enacting clauses which follow the methods of the draftsman are seen in all their admirable simplicity. The Dominions are enumerated by name: they, with the provinces or states that they include, are taken finally out of the category of colonies—and therefore out of the sphere of application of any legislation affecting the colonies. The general provisions in Sections 2, 3 and 4 set free the Dominion legislatures from all limitation of their authority to deal with the affairs each of their own Dominion. Thus:—

(a) The Colonial Laws Validity Act, 1865, was not to apply to any law thereafter enacted by the Parliament of a Dominion, and there was to be no overriding effect for English law or for the provisions of any existing or future Act of the United Kingdom Parliament over any Dominion law thereafter enacted; and the Dominion Legislatures expressly acquired power “to repeal or amend any such Act” or any Order, rule or regulation made under it in so far as it was part of the law of their respective Dominions.

(b) Dominion legislation acquired full powers of extra territorial operation.

(c) No United Kingdom Act of Parliament was to affect a Dominion "unless it is expressly declared in that Act that the Dominion has requested, and consented to, the enactment thereof."

From the sovereignty of the Dominion legislatures as thus formally established, everything else follows—to be effected as and when each Dominion may desire. Executive arrangements can be regulated by the several legislatures and the powers of the Crown cannot be exercised in one Dominion at the instance or on the advice of the Ministers of a different co-equal nation of the Commonwealth. It is to be noted that the emancipating provisions themselves are only to apply to the Commonwealth of Australia, to the Dominion of New Zealand and to Newfoundland if, and as, and when they are adopted and made applicable as part of the law of each of these several Dominions by legislation of their own respective Parliaments. And again there are reservations introduced at the request, and with the consent, of Canada, Australia and New Zealand restricting their power of amending their own Constitutions.

In this fashion in 1931 was the new Imperial Constitution "set down in black and white" to give formal expression and legal effect to the new relationship of free association between Great Britain and the several Dominions as created in 1917 in the midst of and for the purposes of a supreme war effort. Where the brief simplicity of the Statute of Westminster requires supplementing or interpretation in detailed application the "declarations and resolutions," which it was enacted to ratify, confirm and establish, of the several Imperial Conferences may be called in aid—the originating and decisive Resolution of 1917 and the ancillary, declaratory and elucidatory matter contained in the Reports of the Conferences of 1918, 1921, 1926, 1929, 1930.

“The established Constitutional position,” created by the unanimous decisions of the Imperial Conferences, received its formal legal expression by request and consent of the several Dominions in the Statute of Westminster, 1931.

CHAPTER V

THE DOMINION STATUS OF IRELAND: WAR, TRUCE—AND TREATY

IN 1921 war existed in Ireland. On the one side was the Irish Republic declared by representatives of the Irish people. On the other side was the United Kingdom of Great Britain and Ireland. The former waged insurrectionary warfare by guerilla methods. The latter, employing armed police and specially enrolled armed forces of a somewhat similar type, supported by the British Army, were upholding the system of law and administration which depended from the Parliamentary Union of 1800.

(a) Negotiations for Peace by Treaty

On 11th July, 1921, a truce was declared. A British Parliamentary paper (Cmd. 1534) sets out the "Arrangements governing the Cessation of Active Operations in Ireland which came into force on July 11th, 1921." They are stated to have been "the subject of an honourable understanding and were not embodied in any formal signed Agreement." It gives the communiques issued by each side pursuant to that understanding and in view of the fact of Mr. de Valera's having decided to accept the invitation to confer with the Prime Minister in London.

The ensuing negotiations originated in a document (Cmd. 1502) signed by Mr. Lloyd George, Prime Minister of the United Kingdom and dated 20th July, 1921. Couched in eloquent language, the "Proposals of the British Government for an Irish Settlement, 20th July, 1921" present two main features:—

- (1) "that Ireland shall assume forthwith the status of a Dominion."
- (2) "that the conditions of settlement between Great Britain and Ireland shall be embodied in the form of a treaty, to which effect shall in due course be given by the British and Irish Parliaments."

A long correspondence followed in which the main difficulty was "in what capacity would the Irish representatives negotiate?" Mr. Lloyd George would not give the admission involved in receiving the representatives of a sovereign independent Irish Republic, and Mr. de Valera would not give the admission involved in accrediting envoys on any other basis. A compromise eventually provided for "a conference free on both sides and without prejudice should agreement not be reached." Mr. Lloyd George thereupon issued a fresh invitation:—

"to a Conference in London on the 11th October, where we can meet your delegates as spokesmen of the people whom you represent, with a view to ascertaining how the association of Ireland with the community of nations known as the British Empire may best be reconciled with Irish national aspirations."

This invitation was accepted ("our respective positions have been stated and are understood") and the meeting of the delegates was fixed for 11th October (Cmd. 1539). The Anglo-Irish Treaty followed in December, by which Ireland accepted Dominion status.

The "Articles of Agreement for a Treaty between Great Britain and Ireland, 6th December, 1921," were signed on that date by the respective delegations. The British delegation comprised the Prime Minister, the Lord Chancellor and other Cabinet Ministers and the Irish delegation comprised five delegates accredited by Dail Eireann at the instance of Mr. de Valera. The final Articles 17 and 18 provided for the submission of the Agreement to the

Parliaments of the two countries and for its ratification by the necessary legislation if approved by each Parliament. A noticeable feature was that the formal ratification in Ireland was to come not from Dail Eireann but from the members of the Parliament of Southern Ireland convened in a special session for this purpose and for the further purpose of constituting a Provisional Government.

(b) *A Digression into Subsequent Controversy*

At this point it is appropriate to direct the attention of the reader to the substance of these transactions and to the procedure adopted by the Legislatures and Executives of the two high contracting parties at the time and to the form in which they embodied their agreed terms. These things call for scrutiny seeing that it has subsequently been alleged on the part of Great Britain by certain responsible statesmen and lawyers that this instrument was not in fact a treaty, and that it only had force and effect in so far as it was subsequently embodied in an Act of the United Kingdom Parliament. This contention rests apparently upon the view that there could be no treaty inasmuch as the British delegation represented the Sovereign and the Irish delegation represented certain of his subjects who were not competent legally to enter into a treaty or contract with him. But the eminent persons who affirm this view have failed to advert to a different method of approaching the subject and one which would appear to be less repugnant to the plain *communis sensus* of practical statesmanship and which also has the merit of being securely based upon legal principle of that order which is applied where considerations of conscience are introduced to govern formal law. The British delegation accepted the Irish delegation as representing principals competent to contract with them: they did contract with them in full knowledge of their position: and, as will be now seen, the Sovereign Legislature, the

King, Lord and Commons of the United Kingdom of Great Britain and Ireland—also with full knowledge—signified its formal approbation and ratified the agreement entered into on behalf of the State. Action was taken, positions were changed on the faith of the Agreement so made. Great Britain, having offered to make a treaty and having accepted deliberately the contractual competence of the Irish delegation and of the Irish people that it represented for reasons of high policy, is clearly estopped from denying it for the purpose, or with the effect, of evading the reciprocal obligations which it undertook. That would appear to be not only sound law—applicable, of course, only by analogy—but plain, honest, fair dealing. And again. If there was a legal defect, it was cured by the sovereign Act of State. Whatever the aspect of the Treaty which may commend itself to Britain's domestic tribunals, they have no authority or power to thrust it upon the treaty-making and treaty observing functions of the Executive which derive from the Prerogative of the Crown. Nor have they authority or power to override the Legislature. Were it otherwise international agreement would be well-nigh impossible.

(c) Treaty Submitted by the King for the Approval of Parliament in Britain

The quality of the events that followed the signing of the "Articles of Agreement for a Treaty" is beyond controversy. They were consistent only with a considered view that the conclusion of the Treaty was a great Act of State, that is, an Act of the Executive resting on the Royal Prerogative and requiring from Parliament neither initiation nor participation but merely its ultimate acceptance or rejection *en bloc* of the terms agreed upon by the plenipotentiaries of the two contracting countries.

His Majesty King George V telegraphed to the Prime Minister that he was "overjoyed at the splendid news" and added:—

"I am indeed happy in some small way to have contributed by my speech at Belfast to this great achievement" (*The Times*, 7th December, 1921).

On the same day the Lord Chancellor, speaking at Birmingham, indicated the procedure further to be adopted:—

"It may interest you to be informed of the practical steps which, in our judgement, will be necessary to give effect to the decisions which we have reached and to test the opinion here and in Ireland of the majority of the people upon the proposals to which we have set our names. The representatives of Dail Eireann in London, acting with their colleagues in Ireland, will at a very early date—perhaps a week, perhaps ten days, cause that Assembly to be brought together. They will place these proposals before it, with a recommendation on behalf of the plenipotentiaries who represented Sinn Fein in this country that these proposals should be adopted.

"Neither I nor they can say what the decision of Dail Eireann will be. Nor could we do more than ask them, as honourable plenipotentiaries, that they should do what they have undertaken to do—that is, having set their names to this document, that they will recommend it with such influence as they possess. If Dail Eireann should accept these proposals, then on their part they will have carried out what they have undertaken. . . .

"We shall think it our duty . . . to call Parliament together. We shall place before them the terms which you will read in full detail in to-morrow's papers, that we have agreed upon as being essential, subject, of course, to the consent of their Parliament. Equally we, as plenipotentiaries, are subject to the consent of Parliament. We have put our names to these Articles: we

shall put these proposals before both Houses of Parliament. We shall hope to meet with the assent of both Houses of Parliament."

In next day's issue of *The Times* (8th December, 1921) the following appeared:—

"By the King's desire, yesterday's Privy Council was invested with more than its customary formality, in order to mark the greatness of the occasion for calling Parliament together to ratify the conclusion of a Pact ensuring peace and future good relations with the Irish people." (Parliamentary Correspondent.)

Parliament was convened in special session at Westminster on 14th December for the sole purpose of considering the Articles of Agreement for a Treaty. Here is the text of the King's Speech:—

"I have summoned you to meet at this unusual time in order that the Articles of Agreement which have been signed by My Ministers and the Irish Delegation may be at once submitted for your approval.

"No other business will be brought before you in the present Session.

"It was with heartfelt joy that I learnt of the Agreement reached after negotiations protracted for many months and affecting the welfare not only of Ireland, but of British and Irish races throughout the world.

"It is my earnest hope that by the Articles of Agreement now submitted to you the strife of centuries may be ended and that Ireland, as a free partner in the Commonwealth of Nations forming the British Empire, will secure the fulfilment of her national ideals.

"I pray the blessing of Almighty God may rest upon your deliberations."

The Address of the Commons in reply was carried *nemine contradicente* after a hostile amendment had been defeated by 401 to 58.

This was its principal paragraph:—

“Having taken into consideration the Articles of Agreement presented to us by Your Majesty’s Command, we are ready to confirm and ratify these Articles in order that the same may be established for ever by the mutual consent of the peoples of Great Britain and Ireland, and we offer to Your Majesty our humble congratulations on the near accomplishment of that work of reconciliation to which Your Majesty has so largely contributed.”

His Majesty’s answer to this Address contained the following paragraph:—

“I rejoice to be assured that you are prepared to confirm the Articles of Agreement signed by My Ministers and the Irish Delegation, and I pray that this Agreement may speedily accomplish the complete reconciliation of the peoples of Great Britain and Ireland.”

The Address of the Lords in reply, which was in identical terms, was carried by 166 to 47.

The King’s Speech, on the prorogation of Parliament on 19th December, 1921, was as follows:—

“My Lords and Members of the House of Commons:—

“I have received with deep satisfaction the assurance of your approval of the Articles of the Irish Agreement and of your readiness to give effect to its provisions.

“I pray that the blessing of Almighty God may rest upon your decisions.”

The Prime Minister on 14th December, in the Debate on the Address, told the House of Commons:—

“These Articles of Agreement have received a wider publicity than probably any Treaty that has ever been entered into except the Treaty of Versailles. They have been published in every land. No agreement ever

arrived at between two peoples has been received with so enthusiastic and so universal a welcome as the Articles of Agreement which were signed between the people of this country and the representatives of the Irish people on the sixth of this month. They have been received in every part of this country with satisfaction and relief. They have been received throughout the whole of His Majesty's Dominions with acclaim. . . . Every Article was telegraphed to them as soon as the Treaty was signed and, without a dissentient voice, Governments and Parliaments not merely sanctioned and approved, but expressed satisfaction and joy at the transaction."

The reader will note in passing this association of the Governments and Parliaments of the Dominions with the Government and Parliament of the United Kingdom in giving sanction and approval "as soon as the Treaty was signed."

A further passage:—

"The main operation of this scheme is the raising of Ireland to the status of a Dominion of the British Empire—that of a Free State within the Empire, with a common citizenship, and by virtue of that membership of the Empire and of that citizenship owning allegiance to the King."

"What does 'Dominion status' mean? It is difficult and dangerous to give a definition. . . . It is something that has never been defined by an Act of Parliament, even in this country, and yet it works perfectly. All we can say is that whatever measure of freedom Dominion status gives to Canada, Australia, New Zealand or South Africa will be extended to Ireland. . . ."

A further passage from Mr. Lloyd George's peroration alludes to the flouting and discouraging of Ireland's voluntary effort in the Great War:—

"During the trying years of the war we set up for the first time in the history of this Empire a great Imperial

War Cabinet. There were present representatives of Canada, Australia, South Africa, New Zealand, and India, but there was one vacant chair, and we all were conscious of it. It was the chair that ought to have been filled by Ireland. In so far as it was occupied, it was occupied by the shadow of a fretful, resentful, angry people—angry not merely for ancient wrongs, but angry because, while every nation in the Empire had its nationhood honoured, the people who were a nation when the oldest Dominion had not even been discovered had its nationhood ignored. The youngest Dominion marched into the War under its own flag. As for the flag of Ireland, it was torn from the hands of men who had volunteered to die for the cause which the British Empire was championing. The result was a rebellion, and, at the worst moment of the War, we had to divert our mind to methods of dealing with the crisis in Ireland."

Mr Asquith, an ex-Prime Minister and himself a distinguished lawyer, said:—

"I confess that I should have been entertaining the hope that so far as this House is concerned the ratification of a great act of international reconciliation"—(an Hon. Member: "international")—"Yes, international, and I use the term advisedly, might have been carried without a dissentient voice."

And again, in his concluding sentence:—

"At any rate, we shall have this satisfaction, that if this great international pact is ratified now by both these Houses of the Imperial Parliament we can start on our future relations—troubled, stained, in many ways discreditable and even disastrous as they have been in the past—with clean hands and a clear conscience."

Lord Curzon, Secretary of State for Foreign Affairs, in the simultaneous debate in the House of Lords, spoke of

high policy in foreign affairs and of the reality of Dominion status and of the procedure for giving effect to the Treaty:—

“There has not been a Foreign Minister in this country during the last fifty years, who has not felt—and, indeed, often stated, that the strength of England was diminished, and her moral influence jeopardised, by the unsolved position of the Irish question. This was felt not merely in the Dominions where the Irish have been so disturbing a factor, but most of all in the United States of America, where the understanding we so warmly desire has not only been rendered difficult, but almost impossible, by the existence of the Irish question.”

Further on, adverting to the Dominion status to which Ireland was to accede, Lord Curzon spoke of “the Imperial Conference which has insensibly developed into a sort of Imperial Cabinet” and proceeded:—

“When war is concluded, they attend the meetings of the Supreme Council, wherever they are held; they sign the Peace Treaties; they are in a position of absolute equality with Great Britain; they are incorporated in the League of Nations—as Ireland, I hope, shortly will be, for if this Agreement be accepted she has only to ask it—and they enjoy an independent status there.”

The procedure for putting the Treaty into operation was outlined by Lord Curzon. He said:—

“The next point about which Your Lordships may not unnaturally ask for some information is as to the stages through which in the immediate future you will be asked to proceed. We are engaged on the first stage to-day; that is, asking the approval of both houses of Parliament:—and the same thing is going on in Ireland—of the Agreement that has been concluded. The second stage will be that which is provided for in Article 17 of the Agreement, under which a Provisional Government is to be set up in Ireland during the period while the

Constitution of the Free State is being drafted and set in motion. This will no doubt require some discussions and will take up a certain amount of time. Legislation will not be required for that object, though it may be that when the Constitution is set up an Act of Indemnity may be called for in order to cover any informality that may have occurred."

Lord Sumner, a Lord of Appeal in Ordinary, and a distinguished lawyer, raised the question of the propriety of the Government's procedure when he spoke later in the debate:—

"In calling this document a Treaty, or to be more strict, in calling it 'Articles of Agreement for a Treaty between Great Britain and Ireland,' not merely is every constitutional usage violated—that may be a small thing—but a deliberate attempt has been made to convey, as far as the negotiators dared, that Ireland was what the Sinn Feiners have claimed, that Ireland always has been, an independent and separate country which has never bowed the neck to any admitted and voluntary allegiance to the British Crown. Now one asks oneself: 'Why was this done? Why is this called a Treaty? Why is it negotiated as if it was a Treaty?' I can conceive of two reasons and two only. One reason is that it was hoped that it would appease the negotiators, Mr. Griffith and Mr. Collins and the rest. The other is that it was foreseen that it would be a very convenient way of introducing it with the Legislature, when it had to be introduced at long last, and would save the Government a world of trouble."

It may be noted in passing that Lord Sumner, at least, had no doubts in 1921 as to the existence of Dominion status. He said:—

"Do you think that an Act of Parliament establishing a Dominion can be recalled, and that Dominion status once given can be cancelled, even by the Imperial

Parliament which passed the measure? It cannot be done without provoking the indignation of every other of our Dominions, who are justly proud of their Dominion status. . . . But this experiment cannot be undone. When once Dominion status is given it is given for good or for evil. . . . ”

Notwithstanding this clear challenge to the action of the Executive in concluding a Treaty with representatives of the Irish people the House of Lords, as has been seen, signified its approval of the Treaty by a majority of 166 to 47 on 19th December, 1921.

(d) *The Treaty in Operation*

On the morrow of the signature of the Agreement the following announcement appeared in *The Times*:—

“With the ratification of the Agreement in Dublin and in London the withdrawal of British troops from Ireland will begin at once, and it is expected that the withdrawal will have been completed by the time the forthcoming legislation has been carried.” (Parliamentary Correspondent.)

The significance of this announcement is that the Treaty was being put into operation by agreed executive action and that there was to be no waiting for Acts of Parliament. The announcement uses the term “ratification” instead of “approval” which as a promise to ratify in due course was sufficient warrant for the Executive to proceed. The approval was given in London on 19th December, 1921, but in Dublin was longer delayed by animated differences of opinion in Dail Eireann, which was the Legislature of the militant Irish Republic. Although the decision to give or withhold approval lay in fact with Dail Eireann, it was not the body designated by the Treaty to give the formal decision. Accordingly, after Dail Eireann decided

by a narrow margin to accept the Treaty, Mr. Arthur Griffith, as Chairman of the Irish Delegation, took action.

“Mr. Arthur Griffith is summoning the members entitled to sit in the Parliament of Southern Ireland to meet on Saturday morning at the Mansion House. It is expected that the proceedings, though of great importance, will be simple and short. There will be ratification of the Treaty, probably after formal speeches, and Mr. Griffith will be asked to form a Provisional Government. . . .” (*The Times*, 12th January, 1922.) (Special Correspondent.)

The procedure thus outlined was in strict conformity with Article 17 of the Treaty. It was completed a few days later on 15th and 16th January by the formal establishment of the Provisional Government. The following extracts from *The Times* sufficiently describe what occurred:—

“The Irish Treaty Ratified”

“(From Our Special Correspondent)

“The Irish Free State lives and has its being. It was called into existence to-day at a meeting of elected members of the Southern Ireland Parliament convened by President Griffith as Chairman of the Irish Delegation of Plenipotentiaries, and ‘in pursuance of Clauses 17 and 18 of the Articles of Agreement for a Treaty between Great Britain and Ireland signed in London on December 6th, 1921.’ In less than an hour the Treaty was unanimously approved by the members present, and a Provisional Government was appointed, the roll was called and signed, the Minutes of the meeting were read and confirmed. . . .

“President Griffith said:—‘The Provisional Government has now been called into being to see and take charge of carrying out the terms of the Treaty—Dail Eireann remains in existence until the terms of the Treaty are carried out, when a General Election will

be called in this country.'” (*The Times*, 16th January, 1922.)

The Times, 17th January, 1922, gave official communiques issued in Dublin by the two Governments—the Government which was drawing to a close and the Government which was in process of establishment. The first told of the formal meeting of the newly appointed members of the Provisional Government with the Lord Lieutenant in the Council Chamber at Dublin Castle—how Mr. Collins, as head of the new Government, handed to the Lord Lieutenant “a copy of the Treaty, on which acceptance of its provisions by himself and his colleagues had been endorsed The Lord Lieutenant congratulated Mr. Collins and his colleagues, and informed them that they were now duly installed as the Provisional Government” and referred to the arrangements to follow, on his notification of the fact to the British Government, for the transfer of departmental authority and powers. The second was more picturesque in language if not less accurate in purport:—“The members of the Provisional Government of Ireland received the surrender of Dublin Castle at 1.45 p.m. to-day. It is now in the hands of the Irish nation.” It added that “the transfer of Government offices was proceeding” and promised further information.

The same paper gave a telegram sent on the previous evening by the King to the Lord Lieutenant of Ireland:—

“Am gratified to hear from your telegram of the successful establishment of the Provisional Government in Ireland. Am confident you will do all in your power to help its members accomplish the task that lies before them.”

It also gave the following:—

“It is officially announced that the evacuation of the British Army from Southern Ireland will begin immediately with the following infantry battalions” (here follows a list of ten battalions) “These will be followed

by other units of all arms and services as rapidly as transport and other conditions permit. Army stores will be moved concurrently with the troops."

As a pendant to the last preceding paragraph we read later:—

"To-day cheering crowds watched the men of the Free State Army march through the streets of Dublin to take over the military Barracks at Beggars' Bush" (*The Times*, 2nd February, 1922).

In the meantime, Messrs. Collins and Duggan, members of the Irish Provisional Government, had proceeded to London for private conferences as to the transfer of departmental powers, etc. These Conferences concluded on 24th January, 1922 (*The Times*, 25th January, 1922). The substance of what was arranged is to be found in "Heads of Working Arrangements for Implementing the Treaty," 1923 (Cmd. 1911) which contained the following provision:

"That the Lord Lieutenant be instructed to act on the advice of the Irish Ministers in respect of questions relating to the dissolution of the Parliament of Southern Ireland and in all other non-departmental questions, and in respect of each Department, from the date of its formal transfer to the control of an Irish Minister."

In short, the Provisional Government assumed authority and power by virtue of the Treaty, with the full assent and co-operation of the British Government—indeed at the instance of His Majesty's representative in Ireland: and by degrees the machinery of administration was passing into its hands. It must be remembered, however, that the entire system of law and administration, as has already been stated, had heretofore rested upon British statute law. The only convenient method, therefore, of terminating British control and of substituting control by the Provisional Government was by the passing of British laws or Orders in Council to effect the transfer in legal form. Until this

was done there were—and there were bound to be in the very nature of the case—many gaps and omissions in the ordinary routine of government. The normal inconveniences inherent in any interregnum were in this case accentuated by acute differences in the Irish ranks as to the acceptability of the Treaty. The Irish Republican Government which had waged war and maintained an administration so far as war-like conditions would permit had accepted the Treaty—but only by a small majority. Its personnel was split. And as it was to come to an end on the completion of the Treaty settlement, the minority tended to resume their individual liberty, with the result that organisation and discipline were seriously relaxed.

An authoritative account, from the British standpoint, of the position during this transitional stage is available. It is taken from the speech of Mr. Winston Churchill who, as Secretary of State for the Colonies, gave it from his place in the House of Commons, as will shortly be seen, on 16th February, 1922.

On the 7th day of February, 1922, Parliament reassembled at Westminster. The King's Speech contained the following paragraph:—

“The Articles of Agreement signed by My Ministers and the Irish Delegation to which you have already signified your assent have now been approved in Ireland, and the Provisional Government contemplated in that instrument is at the present moment engaged in taking over the administration of the country. The final establishment of the Irish Free State as a partner in the British Commonwealth is anxiously awaited throughout the world. You will, therefore, be invited at an early date to consider such measures as may be necessary to give effect to the Agreement. A Bill of indemnity will also be submitted to you.”

On the following day in the debate on the Address in the House of Lords Lord Birkenhead, the Lord Chancellor,

spoke of the effective ratification of the Treaty by Dail Eireann which was the basis and warrant for the approval in Ireland referred to in the King's Speech. Incidentally, it is made clear that the Treaty represented a compromise in which concessions of principles and sentiments devotedly cherished had been made:—

“We recommended, after elaborate debates, and after taking the whole of our countrymen, represented in Parliament, into our confidence, that this preliminary Agreement should be accepted and endorsed by Parliament. By overwhelming majorities our advice was accepted by both Houses. What happened then, and what is happening now? The matter went for ratification before Dail Eireann. The noble Marquess has said that we must have listened, and that any Englishman must have listened, to some of the expressions which were used in the debates in Dail Eireann with feelings (I think he said) of humiliation.

“I confess that I feel that some allowance must be made for the particular character of the assembly in whose hands lay that decision, to them alike tremendous and desperate. Were they to renounce everything, for which they had declared they would fight as long as they had a drop of blood in their bodies? What was the character of that Assembly? There was hardly a member of it who had not at one time or another been put into gaol by the British Government. It will easily be understood that I am not arguing the merits of those sentences to-day, but am merely analysing the facts, with the resultant consequences upon the constitution of the assembly. There were few of its members who had not lost some relative as a result of the hostilities so recently prevailing. Therefore, it is broadly true to say that you could not have put the ratification of the Treaty before a more bitterly hostile and unfavourable assembly, however you had collected that assembly in Ireland, and while I, like others, was disappointed by the smallness of the majority, I nevertheless counted it, and count it, a great circumstance that the ratification should have been passed by any majority in such an assembly.”

In the House of Commons on 16th February, 1922, Mr. Winston Churchill moved the Second Reading of the Irish Free State (Agreement) Bill:—

“It is my duty to ask the approval of the House for this Bill. It gives effect to the Treaty which both Houses have already approved by such large majorities. It clothes the Provisional Government with lawful power and enables them to hold an election under favourable conditions at the earliest moment.”

Mr. Churchill adverted to the position of the Provisional Government in Ireland which, presiding over an interregnum, was the agreed creation of the Irish Republican and of the British authorities—and which rested temporarily, therefore, neither on Irish nor on British law but solely on the Treaty:—

“A Provisional Government, unsanctified by law, yet recognised by His Majesty’s Ministers, is an anomaly, unprecedented in the history of the British Empire. Its continuance one day longer than is necessary is derogatory to Parliament, to the Nation, and to the Crown. We must legalise and regularise our action. Contempt of law is one of the great evils manifesting themselves in many parts of the world at the present time, and it is disastrous to the Imperial Parliament to connive at or countenance such a situation in Ireland for one day longer than is absolutely necessary.”

Mr. Ronald McNeill: “It is your own creation.”

Mr. Churchill: “Yes, with the full approval of both Houses of Parliament. Moreover, what chance does such a situation give to the Irish Executive who, at the request of the King’s representative in Ireland—made, of course, on the advice of His Majesty’s Government—has assumed the very great burden and responsibility of directing Irish affairs?”

A candid and lucid passage describes the difficulty about the Irish Republic. The Irish Republic had made war and it had thereafter made peace. But the British

Government did not, and would not, "recognise" it. Hence Britain, in effect, made peace with the Provisional Government as the agreed nominee of the unrecognised Irish Republic—as arranged by the British and Irish plenipotentiaries—with the people of Ireland as the recognised principal in the background. Hence the desire for an election in order that the will of the recognised principal might be ascertained.

"The first of these objects is a National decision upon the Treaty by the Irish people. I am asked every day by my hon. Friends below the Gangway questions about the Irish Republican Army. I will explain the view of the Irish Government on that point. It is very important we should understand the different points of view. Whether we agree with them, or sympathise with them, or recognise them, is quite another matter, but it is important we should understand them. This is the view of the Irish Government, the Irish signatories of the Treaty. Their view is that the Irish Republic was set up by the Irish people at the elections which took place during the Conference, and that this Irish Republic can only be converted into an Irish Free State by the decision of the Irish people. That is not our view. We do not recognise the Irish Republic. We have never recognised it, and never will recognise it. I am explaining their view and they say that they were elected by the Irish people on a certain basis, and that only the Irish people can release them. They are determined to stand by the Treaty and to use their utmost influence with the Irish people to procure their adhesion to the Treaty, and that will, from the Irish point of view, be the act which will disestablish finally the Republic. Take Mr. Griffith's position. Mr. Griffith has not joined this Government. He has been chosen as the President of the Dail. He is also, in Irish eyes, the President of the non-recognised Irish Republic, and if the Irish people accept his advice and guidance, and ratify the Treaty and endorse the Treaty which he has signed, he will be able to disestablish the Irish Republic and to lay aside these functions. These matters do not

affect us in our procedure in any way; but is it not a desirable thing that upon the authority of the Irish people recorded at an election, the Republican idea should be definitely, finally and completely put aside?

"The second object of the election is to secure an adequate constituent assembly."

Mr. Churchill indicated the further steps for giving effect to the Treaty:—

"The next thing will be the holding of the Irish election, which I might provisionally fix for March or April. The next thing is that the Irish Free State Parliament should assemble and, acting as a Constituent Assembly, should make the Constitution. Let us hope that that will be in progress in May or June. Then there is the final confirmatory legislation in the Imperial Parliament, which, we may say, will take place in June or July, if the time-table were observed."

(e) Statutory Implementation of the Treaty

The Irish Free State (Agreement) Act received the Royal Assent on 31st March, 1922.¹ The Act contains no recitals. It appears, upon its face, to be the first portion of the legislation necessary for ratifying and giving effect to the Treaty. The Treaty itself is set forth in a Schedule and Sec. 1 (i) Provides that it "shall have the force of law as from the date of the passing of this Act." Provision is made (Sec. 1 [ii]) "for the purpose of giving effect to Article 17 of the said Agreement" for Orders in Council transferring powers and machinery of administration and also for the dissolution of the Parliament of Southern Ireland and for the utilisation of the existing electoral law for the purpose of electing "the House of Parliament to which the Provisional Government shall be responsible." No further elections were to be held in Southern Ireland for members to sit at Westminster. "This Act shall not be deemed the Act of

¹ For the text of this Act see Appendix, p. 301.

Parliament for the ratification of the said Articles of Agreement as from the passing whereof the month mentioned in Article XI of the said Articles is to run" (Sec. 1 [v]). Sec. 2 gives the title of the Act. Following upon this enactment, the transfer of the administrative machine to the Provisional Government was completed. The Parliament of Southern Ireland elected in 1921 was dissolved. The Provisional Parliament was elected and functioned as a Constituent Assembly. It enacted the Constitution of the Irish Free State in accordance with the terms of the Treaty. And the British Parliament completed its ratification of the Treaty by passing the Irish Free State Constitution Act, 1922 (Session 2)¹ which, [after reciting "Whereas the House of the Parliament constituted pursuant to the Irish Free State (Agreement) Act 1922, sitting as a Constituent Assembly for the settlement of the Constitution of the Irish Free State, has passed the Measure (hereinafter referred to as 'the Constituent Act') set forth in the Schedule to this Act, whereby the Constitution appearing in the First Schedule to the Constituent Act is declared to be the Constitution of the Irish Free State"] enacted (Sec. 1) that this Constitution should be the Constitution of the Irish Free State. Of Sections 2, 3 and 4 which dealt with the temporary continuance of the existing system of taxation and the constitutional position as to existing and future Imperial legislation, more will be said in the ensuing chapter. The last section, Sec. 5, provides that this Act "shall be deemed to be the Act of Parliament for the ratification of the said Articles of Agreement as from the passing whereof the month mentioned in Article XI of the said Articles is to run."

The Constitution of the Irish Free State came into operation on 6th December, 1922, by Royal Proclamation, as provided in Article 83.

War had given place to truce on 11th July, 1921. Truce gave place to Treaty on 6th December, 1921. Under the

¹ For the text of this Act see Appendix, p. 309 et seq.

Provisional Government established by the Treaty the Irish Free State area was governed from 16th January, 1922, to December, 1922. Thereafter the Irish Free State was governed under its own constitution as decreed and enacted by the Irish Constituent Assembly and further enacted by the Parliament of the United Kingdom as the final act of its ratification of the Treaty. It is to be added that by both enacting bodies the Constitution was accepted as being in conformity with the Treaty. And both were in expressed accord that if any provision of the Constitution or any amendment thereof was repugnant to the provisions of the Treaty it should be held void and inoperative and provisions implementing the Treaty substituted therefor. In short, the Irish Free State under its own constitution was possessed of the full Dominion status, no less and no more, that was assured to it by the Treaty.

Thus the Anglo-Irish war was finally ended by the acceptance by Ireland of the offer made by the Prime Minister of Great Britain, on 20th July, 1921, of Dominion status resting upon a settlement "embodied in the form of a Treaty."

CHAPTER VI

THE DOMINION STATUS OF IRELAND—THE CONSTITUTION AND ITS ORIGIN

(a) *The Irish Constituent Assembly*

THE Constitution of the Irish Free State was enacted by Dail Eireann on 24th October, 1922. In accordance with Article 83 (one of its transitory provisions) it was brought into operation, as has been seen, on 6th December, 1922, by Royal Proclamation after the passage at Westminster of the Confirmatory Act.

It is of high importance to observe what was done—and why it was done—in these concluding measures for bringing the Treaty régime into being. The purely legalistic view has been propounded—parallel to that about the Treaty as described on page 80 above—that this Constitution has had no force or effect except in so far as it rested upon a British enactment. It has also been laid down that the Provisional Parliament “had no authority to make a Constitution.” Whilst guarding against any acceptance of such contentions it is well to bear them in mind when following in some detail these final stages of the implementation of the Treaty.

Now what was the body which drafted and enacted the Constitution of the Irish Free State in 1922? The answer is that by whatever name it may be called, it was in fact the Parliamentary body convened, as has been seen, by President Griffith as Chairman of the Irish plenipotentiaries by virtue of Article 17 of the Treaty: it was the body whose approval of the Treaty in January, 1922, brought the Provisional Government into being. The reader will recall

the dualism of legal authority and method adopted by both sets of signatories to the Treaty for the purpose of converting the Irish Republican régime into a Dominion status régime. Mr. Churchill's speech is an authoritative exposition of how Britain co-operated in this. This Provisional Parliament, or second Dail Eireann as it was termed in Ireland, consisted therefore at first of the members elected to the Parliament of Southern Ireland on 13th May, 1921. Subsequently it consisted of the members elected on 16th June, 1922, at the special General Election provided for as a further implementation of Article 17 by Resolution dated 20th May, 1922, of the Second Dail Eireann and also by the Irish Free State (Agreement) Act, 1922. The object of this General Election was, as Mr. Churchill stated, to obtain a popular mandate confirming the parliamentary approval of the Treaty already given and to obtain an adequate Constituent Assembly which should "make the Constitution." That was the original purpose. Its authority thus was to be derived from the free and unconstrained voting of the people of Ireland. And the arrangement for its election in order that it might perform these functions was, as has been seen, the result of agreement between the two sets of signatories of the Treaty as to the most convenient method of giving effect to Article 17 and to the Treaty generally.

There can be no controversy as to the facts, however widely opinions may have differed subsequently as to their correct interpretation. In Ireland, the newly-elected Parliament believing, not unnaturally, that national independence, newly won, conferred the right to call itself by an Irish national appellation and to declare its own competence as the Irish Constituent authority passed an enactment of which the title and opening passage are as follows:—

"Act of Dail Eireann, sitting as a Constituent Assembly, enacting a Constitution for the Irish Free State (No. 1 of 1922), Oct. 25th, 1922."¹

¹ For the text of this Act see Appendix p. 311.

"Constituent Act"

"Dail Eireann, sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in the confidence that the National life and unity of Ireland shall thus be restored, hereby proclaims the establishment of The Irish Free State (otherwise called Saorstat Eireann) and in the exercise of undoubted right, decrees and enacts as follows":

The British Parliament replied with an enactment:—

"Act of the Imperial Parliament to provide for the Constitution of the Irish Free State, December 6th, 1922 (13 Geo. 5. c.l., Session 2),"

in which the first recital in the Preamble is as follows:—

"Whereas the House of the Parliament constituted pursuant to the Irish Free State (Agreement) Act, 1922, sitting as a Constituent Assembly for the settlement of the Constitution of the Irish Free State, has passed the Measure (hereinafter referred to as 'the Constituent Act') set forth in the Schedule to this Act, whereby the Constitution appearing as the First Schedule to the Constituent Act is declared to be the Constitution of the Irish Free State":

and thereupon in Sec. 1 enacted:—

"1. The Constitution set forth in the First Schedule to the Constituent Act shall, subject to the provisions to which the same is by the Constituent Act so made subject as aforesaid, by the Constitution of the Irish Free State":

and in Sec. 5:—

"5. This Act may be cited as the Irish Free State Constitution Act 1922 (Session 2), and shall be deemed to be the Act of Parliament for the ratification of the said

Articles of Agreement as from the passing whereof the month mentioned in Article eleven of the said Articles is to run."

Here then is the final ratification by Britain of the Treaty itself and of the Constitution as being in accord with the Treaty. And in it are adoption, confirmation and ratification by Britain in the plainest and most unambiguous terms not merely of the Irish Free State Constitution as enacted in Ireland by Dail Eireann but also of that parliament's procedure in functioning as a Constituent Assembly and in asserting Irish legislative independence in plain language. How can it be otherwise than adoption, confirmation and ratification? It is true that following the current formalism of Dominion status and as an accepted method of signifying ratification the Constitution of the Irish Free State as enacted in Ireland was thus embodied in a British statute. But it is equally true that the Constitution itself, following the Treaty which is the root from which it continues to exist and grow, establishes in express language the legislative independence of the Irish Free State. The British statute would appear to be something more, therefore, than a case of a law that is to be governed by constitutional right or convention. Here the formal law abdicates inasmuch as it purports to create or confirm indefeasible national rights beyond the scope of its further sole authority. Any other view would involve a contradiction in terms. A ratification which *ipso facto* destroys the thing ratified would be an absurdity.

(b) *What British and Irish Leaders Said*

Before passing to consider what the parliamentary draftsman actually did it is only appropriate to consider the circumstances and atmosphere in which in 1921-22 their work was undertaken. Fresh from signing the Treaty, Mr. Michael Collins said:

"The only association satisfactory to all concerned will be one based not on the technical legal status of the Dominions, but on the real position which they claim, and have in fact secured. In the interests of all the Associated States, in the interests, above all, of England herself, it is essential that the present *de facto* situation should be recognised *de jure* and that all its implications as to sovereignty, allegiance and constitutional independence of the Governments should be acknowledged" (*The Times*, 8th December, 1921).

The reference to Dominion status as declared and agreed at the recent Imperial Conferences is unmistakable. Mr. Collins was thus losing no time in making the position clear before the discussion of the Treaty terms got seriously under way in Britain and Ireland. His statement did not pass unnoticed. But neither when the Treaty was submitted for approval at Westminster, nor in the discussions of the Irish Free State (Agreement) Bill three months later, was there any responsible suggestion that Ireland was getting anything less than full Dominion status. Indeed, when doubts had been expressed in Dublin, the British Prime Minister, Mr. Lloyd George, wrote to Mr. Arthur Griffin a letter dated 13th December, 1921, for use in the Irish debate on the Treaty which contained assurances that:

"the special arrangements agreed between us in Articles 6, 7, 8 and 9, which are not in the Canadian Constitution, in no way affect status. . . . They in no way affect the position of the Irish Free State in the Commonwealth or its title to representation, like Canada, in the Assembly of the League of Nations. . . . It is our desire that Ireland shall rank as co-equal with the other nations of the Commonwealth, and we are ready to support her claim to a similar place in the League of Nations as soon as her new Constitution comes into effect. The framing of that Constitution will be in the hands of the Irish Government subject, of course, to the terms of the Agreement. . . .

The establishment and composition of the Second Chamber is, therefore, in the discretion of the Irish people."

Here then was further assurance from the pen of the Prime Minister of Britain for the purpose of securing Ireland's assent to the Treaty.

And when one year later the Irish Constitution, as enacted by the Irish Constituent Assembly, came to be considered at Westminster, the new Prime Minister, Mr. Bonar Law, spoke in no different sense. In moving the Second Reading of the Irish Constitution Bill which was to effect the final ratification of the Treaty, he spoke of the contrast between statute law and constitutional convention in language which completely harmonised with that of Mr. Collins:

"Our Constitution—not only the Constitution of this country, but the relations of this country to the Dominions—is not a written Constitution. If you were to pass an Act of Parliament to define any of our actions, you would discover that the practice had completely changed from that which is found in the Statute, to such an extent that I think it would be generally agreed—the words are, I think, Professor Dicey's—that the prerogative of the Crown had largely become the privilege of the people. It is exactly the same in our relation to the Dominions. If we were to take the statutory expression as to what those relations are, it is obvious that you would find that they were entirely out of touch with the actual state of things to-day."

Proceeding he echoed the expressions of reluctance to define too closely "the present relations between the Dominions and the Mother Country," whilst admitting in general terms the quality of the Dominions' rights:

"If there were an attempt resulting from this Irish Constitution to define by Statute what the relations of the

Dominions are, it would not be merely a question between us and Southern Ireland. It would be a question of the most far-reaching importance, and I do not hesitate to say that the very fact that the Dominions have grown in stature as the result of the War makes it more necessary than ever it was before that when the new influence which they ought to exercise on our whole policy has no fixed machinery for carrying it out, it is more important than ever before that nothing that should be done to suggest that their powers are less than we know them to be, and they believe them to be."

He told the House of Commons that the Irish Constitution was, in the opinion of the Law Officers both of his own and of the preceding Government, in accordance with the Treaty. He revealed that the draft Constitution, prior to its enactment in Ireland, had been the subject of negotiation and that it had been modified to meet the view of Lord Hewart, Lord Chief Justice of England, who authorised him to say "in his opinion also the Constitution is in accordance with the Treaty."

One result of this negotiation had been that the Constituent Assembly had introduced into the Constituent Act enacting words to give the force of law to the Treaty (which it included in a Schedule) and to provide that its terms should dominate those of the Constitution.

The leader of the Opposition, Mr. Ramsay MacDonald, was in full agreement with the Prime Minister:

"I desire to associate myself with what the right hon. Gentleman has said. The less said about this Bill the better. Criticism is useless. Sympathy is dangerous. All that this House can now do in relation to Irish Government is to implement its part of the Agreement and to allow this Bill to become law. Though I may be allowed to echo what the right hon. Gentleman has said about the difficulties that it may create of a much wider character than merely the difficulty of defining the exact relations between Ireland and ourselves. I hope the time will

never come when there will be any attempt made to define in rigid legal formulae the relationships between the different parts of this self-governed Empire. The one safety of the Empire is that the relationships shall remain organic rather than legal."

Nor were responsible utterances in the House of Lords different. It is sufficient to quote two great lawyers. Lord Sumner said:

"The one question is whether it is safe to pass this Bill, which makes of this Irish Constitution an Imperial Statute, as being in conformity with the Treaty, which, as an instrument, was given the force of law after being ratified by both Houses, which is binding upon us, and which, without any hesitation, every speaker in all parts of the House agrees that it is our duty to carry out. On an occasion like this it has obviously been a supreme comfort to His Majesty's Government that they could lay the matter before their legal advisers and there leave it."

And again:

"If that is so, it will be a consolation to me if the Lord Chancellor can give us that assurance, because if this Dominion *status*—which although not written is perfectly well understood—is preserved and is to be preserved hereafter, I do not think the difficulties that will arise in connection with the vagueness or peculiarity of some of these Articles will much affect this country."

The Lord Chancellor, Viscount Cave, said:

". . . because my noble and learned friend Lord Sumner recalled the House to the practical question with which your Lordships have to deal, namely, whether this Constitution is or is not in accordance with the Treaty, and, after very kindly reference to myself, he asked me pointedly whether in my opinion it is. Attention has not been called to-day to any clause of the Constitution

which is said to be in conflict with the Treaty. Perhaps that abstinence may have been due to the considerations which the noble and learned Lord mentioned. At all events, that is the fact, and I cannot call to mind any clause which I could say, even taken by itself, is in violation of the Treaty.

And again:

"It is enough for me to say, first, that I share with every speaker the views which have been expressed, that this country is bound in honour, whatever our individual opinions may be, to give effect to the Treaty entered into on its behalf and ratified by Parliament; secondly, that I, in common with my colleagues, shall certainly do my best to give effect to the Treaty, not only in the letter but in the spirit."

And again:

"The Treaty requires that the Constitution shall be passed in identical terms by both the British and the Irish Parliaments."

"We have done what we could by agreeing with those who represent the Irish Government as to certain clauses which are found in the Bill, and which explain in a manner which I think will be satisfactory to the House certain points upon which confusion might have arisen, and I think it would be very difficult indeed for this House to improve them."

And lastly:

"But as regards the framing of the Irish Parliament, the provisions relating to the Senate, and so on, they are wholly within the powers given to the Irish Provisional Parliament, the Irish Constituent Assembly, by the Treaty.

"That Assembly might have set up a one-chamber Government with no Senate at all."

When we collect the purport of the foregoing passages it seems to be abundantly clear that the responsible heads of the British Government—and of the Opposition as well—were engaged in their own view not in legislating for Ireland but in implementing and ratifying the Treaty—a great Act of State which by contract conceded legislative independence to Ireland. It seems also to be clear that the British Parliament did—and intended to—recognise in express and unmistakable terms the validity of the Constituent Act and the competence of the Irish Constituent Assembly to enact it for the Irish Free State under the terms of the Treaty, inasmuch as Ireland, by virtue of the Treaty, had attained to the legislative independence inherent in Dominion status. Is it not also clear that there was a marked reluctance on the British side to proceed to statutory definitions of inter-Imperial relations, and that where divergences of view occurring in such matters compromise ensued, the rights of both of the high contracting parties were preserved by subordinating the Constitution to the Treaty so that the full rights created or preserved by the Treaty should continue in existence for subsequent assertion and effect as occasion might arise?

(c) *Making the Change Over.*

The Constitution and the Consequential Provisions Act.

Thus the task of the draftsmen on either side was one of obvious difficulty. Dominion status, as has been seen, was a definite and admitted right; but, so far, it was in the nature of an inchoate right not yet worked out in concrete phrase and form and practice but resting upon constitutional conventions which restrained and tempered and overrode, where need be, the outworn and anachronistic provisions of Statute or Order in Council. The Imperial Conference of 1921 put off the task of defining the new constitutional relations. And in the Treaty Debates at Westminster both

the Prime Minister and Mr. Asquith deprecated efforts at final definitions as involving a loss of elasticity in a still developing organism. And after a few months the new Prime Minister and the new Leader of the Opposition have been seen to express a similar reluctance. All the work of elucidation in detail, of definition and of adjustment which was later performed by the Imperial Conferences of 1926, 1929 and 1930 had yet to be done.

It is not unnatural, in these circumstances, that there were some differences of opinion between the Irish draftsmen and their British critics. Nor can it be adjudged as other than reasonable that on the more difficult issues a compromise ensued which kept all debatable claims open for subsequent settlement by leaving the Treaty in continuing operation on all questions of constitutional right. That, clearly, was a protection for the wider view of Dominion status just as much as for the narrower view. It left Ireland to advance or stand still with the other Dominions. It left her to gather the fruits of her new status as they might be worked out in practice.

What then was done?

The answer is most conveniently given in a series of propositions which summarise the steps taken:

- (i) The two previously existing systems whose conflict had caused war are shaped into an agreed new system. Irish Republican institutions are blended and modified into the new Constitution within the limits, partly defined, of Dominion status. The British system (of the Act of Union, 1800, and the Government of Ireland Act, 1920) is displaced by the new Constitution which, however, adopts and converts to new uses much of its structure of law and administration.
- (ii) The legislative independence of Ireland is asserted by the enactment of the Constitution by Dail Eireann sitting as the Irish Constituent Assembly—

admitted by the ratification by the high contracting parties.

- (iii) British legislation, *previously in operation in Ireland*, is either
 - (a) adopted, so far as it is adopted, by Article 73 of the Constitution which provides that it shall continue in operation subject to the provisions of the Constitution, until amended or repealed by the Oireachtas, or
 - (b) repealed by the Irish Free State (Consequential Provisions) Act which was passed at Westminster simultaneously with the Irish Free State Constitution Act.
- (iv) British legislation *not hitherto affecting Ireland but to operate in Ireland in future* is dealt with by Secs. 3 and 4 of the British Act ratifying the Constitution:
 - (a) any existing Act "which applies to or may be applied to self-governing Dominions" may be made in like manner to be applicable to Ireland "if the Parliament of the Irish Free State make provision to that effect."
 - (b) the power of the British Parliament is expressly preserved "to make laws affecting the Irish Free State in any case where, *in accordance with constitutional practice*, Parliament would make laws affecting other self-governing Dominions."
- (v) Certain forms and arrangements as existing in the other Dominions are grafted on to the Constitution (in virtue of the compromise already referred to) but with an express saving of the fundamental constitutional doctrines relating to them.
- (vi) Ireland's power to amend her own Constitution—as long as it continues to conform to the Treaty—is fully preserved.

The general effect of these measures may be summed up by saying that the Irish Constitution was framed in accordance with the fundamental principles of Dominion status so far as their incomplete definition at the time permitted,

and that the legislative independence of the new Dominion and its powers of Constitutional amendment permitted of its completing its legislative realisation of its Dominion status at any time when the practical application of the principles of that status as to external relations were more clearly established. On this latter head the Treaty remained dominant and continuously operative. The legislative independence itself does not rest merely on the general terms of the Constitution and on the fact of its ratification by Britain. Article XII declares: "The sole and exclusive power of making laws for the peace, order and good government of the Irish Free State (Saorstát Éireann) is vested in the Oireachtas." It rests also upon the express provisions implementing the Constitution as to the effect of British laws in Ireland. These provisions, as shewn in the preceding paragraph, are in British statutes. All existing British laws affecting Ireland are expressly subordinated to the Constitution and to the will of the Oireachtas which may or may not adopt them as it wishes. All other British laws affecting Dominions are expressly subordinated to the will of the Oireachtas which may, or may not, adopt them as it wishes. All future British legislation to affect Ireland is to be governed by "constitutional practice"¹ which implies the request and consent of Ireland. There is no other possible category. Thus there is a comprehensive renunciation in express terms of any possible claim that the legislative will of the Oireachtas can be overridden by any British law or legislation. There certainly appears to be no place left for the Colonial Laws Validity Act, 1865, in any category of British statutes affecting the Irish Free State.

(d) *What was Deferred. Inter-Imperial Relations.*

The Treaty and the Constitution thus put into effective operation, launched the Irish Free State on its new career

¹ This provision anticipates the more specific terms of Sec. 4 of the Statute of Westminster.

with full legislative independence. Its relationship to the remainder of the Commonwealth still awaited further definition as and when the process of clarifying the new Imperial relationships and of amending the outworn forms should be carried further. Until this process was complete, Ireland—though with her Dominion status assured to her by the most formal and binding guarantees which the Crown, by virtue of the Royal prerogative supported by the British Legislature, had it in its power to accord—would not possess in “black and white” all that that status implied. It was because of this fact that the Treaty was maintained in active operation as the governing factor of Ireland’s constitutional position. The Constitution as adopted differed from the Constitution as drafted. As drafted, it did not, in the British view, contain certain provisions necessarily incident to Ireland’s Dominion status. These had been advisedly omitted by the Irish draftsmen as being anachronisms pertaining to the Colonial era which the Dominions had outlived and as being inconsistent with the full legislative independence which Dominion status now admittedly implied and which, in fact, existed in spite of the persistence of archaic formalisms. The Treaty was admittedly the test. But the Treaty lacked the detail necessary for an immediate decision of the debated points—and there was need for haste. A compromise, as has been seen, was arrived at. The Constituent Assembly inserted in their draft certain provisions desired by the British representatives, and imported the Treaty bodily into the Constitution, giving it the force of law and according it a dominant effect. Britain accepted this compromise by her act of statutory ratification. The Treaty thus remained the test and touchstone pending the further elucidation of Dominion status “in black and white.”

The matters that were so left over were of great importance. What they were, and how they were treated in succeeding Imperial Conferences, can be followed up in

the several Reports. For present purposes it is unnecessary to pursue them in detail. It is sufficient, in indicating their general range and effect, to stress certain salient points which bear directly upon present Anglo-Irish relations.

(e) *The Imperial Conference of 1926.*

The Imperial Conference of 1926 resumed the task, postponed by the Conference of 1921, of dealing with the formal changes necessitated by the war-time creation of Dominion status. This was the occasion of the famous Balfour declaration which has been accepted as the keynote for all subsequent discussion. It is enshrined in the Report of the Inter-Imperial Relations Committee,¹ from which come the following quotations:

"We were appointed at the meeting of the Imperial Conference on the 25th October, 1926, to investigate all the questions in the Agenda affecting Inter-Imperial Relations. Our discussions on these questions have been long and intricate. We found, on examination, that they involved the consideration of fundamental principles affecting the relations of the various parts of the Empire *inter se*, as well as the relations of each part to foreign countries. For such examination the time at our disposal was all too short. Yet we hope that we may have laid a foundation on which subsequent Conferences may build."

"The Committee are of opinion that nothing would be gained by attempting to lay down a Constitution for the British Empire. . . .

"There is, however, one most important element in it which, from a strictly constitutional point of view, has now, as regards all vital matters, reached its full development—we refer to the group of self-governing

¹ This Committee was appointed on 25th October, 1926. Its report was "unanimously adopted by the Conference on the 19th November and was published on the following day."

communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. *They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*"¹

The past process of growth leading up to the full development which it was now necessary to provide with its legal and administrative expression is aptly described:—

"The rapid evolution of the Overseas Dominions during the last fifty years has involved many complicated adjustments of old political machinery to changing conditions. The tendency towards equality of status was both right and inevitable. Geographical and other conditions made this impossible of attainment by the way of federation. The only alternative was by the way of autonomy: and along this road it has been steadily sought. Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever."

And again:

"The British Empire is not founded upon negations. It depends essentially, if not formally, on positive ideals. Free institutions are its life-blood. Free co-operation is its instrument. Peace, security and progress are among its objects. Aspects of all these great themes have been discussed at the present Conference; excellent results have been thereby obtained. And, though every Dominion is now, and must always remain, the sole judge of the nature and extent of its co-operation, no common cause will, in our opinion, be thereby imperilled.

"Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our Inter-Imperial Relations."

¹ The Report of the Conference of 1926 gives this passage in italics.

The Report then deals (Section 3) with "The Relations between the various parts of the British Empire:—

"Existing administrative, legislative, and judicial forms are admittedly not wholly in accord with the position as described in Section II of this Report. This is inevitable, since most of these forms date back to a time well antecedent to the present stage of constitutional development. Our first task then was to examine these forms with special reference to any cases where the want of adaptation of practice to principle caused, or might be thought to cause, inconvenience in the conduct of Inter-Imperial Relations."

The matters to which the Committee thus specially turned its attention were:—

- ¹(a) The Title of His Majesty the King.
- (b) The Position of the Governor-General.
- (c) The Operation of Dominion Legislation.
- (d) Merchant Shipping Legislation.
- (e) The Appeal to the Judicial Committee of the Privy Council,

with results which may be summarised as follows:—

- (a) A slight change in the Royal Title being unanimously recommended as desirable, a change in the sense desired was effected in the following year by the enactment of the Royal and Parliamentary Titles Act, 1927.
- (b) A change in practice was effected by agreement. In the words of the Report:—
 "The representatives of Great Britain readily recognised that the existing procedure might be open to criticism and accepted the proposed change in principle in relation to any Dominion which desired it."

¹ These five sub-headings are the sub-section headings of Section 3 of the Report.

The view expressed by the Committee that:—

“It is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by H.M. the King in Great Britain and that he is not the representative or agent of H.M. Government in Great Britain or of any Department of that Government,”

and that he should no longer be the formal channel of communication between the British Government and the Government of the Dominions, was soon thereafter given effect in constitutional practice.

(c) A recommendation was made that a special expert Committee should consider:—

- (i) Existing statutory provisions requiring reservation or authorising the disallowance of Dominion legislation:
- (ii) Extra-territorial effect for Dominion legislation and
- (iii) The Colonial Laws Validity Act, 1865:

and a declaration was made that:

“We propose that it should be placed on record that, apart from provisions embodied in Constitutions and in specific Statutes expressly providing for reservation, it is recognised that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently it would not be in accordance with Constitutional practice for advice to be tendered to His Majesty by His Majesty’s Government in Great Britain in any matter appertaining to the affairs of a Dominion

against the views of the Government of that Dominion."

(d) A special sub-Conference was recommended:—

"to consider and report on the principles which should govern, in the general interest, the practice and legislation relating to merchant shipping in the various parts of the Empire, having regard to the change in constitutional status and general relations which has occurred since existing laws were enacted."

(e) "A general constitutional principle was raised" in the discussion of this subject:—

"From these discussions it became clear that it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected. It was, however, generally recognised that, where changes in the existing system were proposed which, while primarily affecting one part, raised issues in which other parts were also concerned, such changes ought only to be carried out after consultation and discussion.

"So far as the work of the Committee was concerned, this general understanding expressed all that was required. The question of some immediate change in the present conditions governing appeals from the Irish Free State was not pressed in relation to the present Conference, though it was made clear that the right was reserved to bring up the matter again at the next Imperial Conference for discussion in relation to the facts of this particular case."

The reader will note as salient points in this brief résumé:—

- (a) The Conference was elucidating and defining an already existing status and considering adjustments of constitutional machinery to give it due effect.
- (b) The Irish Free State was concerned, *inter alia*, with the application of "a general constitutional principle" regarding "the conditions governing appeals . . . to the Judicial Committee of the Privy Council," and refrained from pressing its own case to an immediate decision in view of the desirability of preliminary consultation and discussion where changes in the existing system for one unit might concern others.
- (c) Britain waived all claim that the appeal to the Judicial Committee of the Privy Council was a necessary incident of the organisation of the Commonwealth.
- (d) The immediate operative effect of the view of the Conference in regard to the position of Governors-General of Dominions—an effect which rested, and still rests, upon "the established constitutional position" as established in this and other Imperial Conferences and not upon any statute of the Imperial Parliament.

These salient points emerge, it is to be remembered, from the clear and unmistakable language of the unanimous Report of the Conference which was adopted without reservation or qualification by all members of "the group of self-governing communities composed of Great Britain and the Dominions."

(f) *The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929.*

This Report of what was in effect a subsidiary expert Conference was subsequently approved by the Imperial

Conference of 1930 and is "to be regarded as forming part of the Report of the present Conference" (1930) subject to certain specified modifications. The task of the Conference of 1929 was, as expressed in their Report:—

" . . . merely that of endeavouring to apply the principles, laid down as directing their labours, to the special cases where law or practice is still inconsistent with those principles, and to report their recommendations as a preliminary to further consideration by His Majesty's Governments in the United Kingdom and in the Dominions."

and of the guiding principles so laid down their Report says:—

"These principles of freedom, equality, and co-operation have slowly emerged from the experience of the self-governing communities now constituting that most remarkable and successful experiment in co-operation between free democracies which has ever been developed, the British Commonwealth of Nations; they have been tested under the most trying conditions and have stood that test; they have been given authoritative expression by the Governments represented at the Imperial Conference of 1926; and have been accepted throughout the British Commonwealth."

The Report contains the recommendations of the Conference together with the considerations and reasoning upon which they were based. It gives much matter of historical and constitutional value.

(g) *The Imperial Conference, 1930.*

The Imperial Conference of 1930, profiting by the labours of the Expert Conference of 1929, carried forward the task of giving effect to the principles enunciated by the Conference of 1926 as the essential conditions of Dominion status.

It eventuated in the passing in 1931 by the Imperial Parliament of the Statute of Westminster, by the request and with the approval and consent of every member of the Commonwealth, with the recording of certain conclusions as to constitutional practice and with the adjustment of other matters by agreement between the several units of the Commonwealth.

In opening the proceedings on 1st October, 1930, Mr. Ramsay MacDonald, Prime Minister of the United Kingdom, said:—

“It is now our task to consider, upon the basis of our experience, how to give practical effect to the declarations of 1926. In order to prepare for our work, the existing legal structure of the Commonwealth had to be examined to see what modifications and adaptations are required to bring it into accord with these declarations. This has been done with the care and thoroughness which we expect from such distinguished legal minds as composed the Conference on the Operation of Dominion Legislation which met in London last autumn. We shall have to examine the report of that Conference and consider what is to be done with its recommendations. Whilst engaged in that work we shall not forget that behind it is the thought of building for the future.”

The urgency of critical world affairs was in 1930, as now in 1937, of pressing import. The need of internal harmony as a prerequisite for effective combined action in the world arena was stressed.

“In the sphere of foreign affairs the great objective is to secure and maintain world peace and uphold the influence of our Commonwealth of Nations in world affairs. Since 1926 I think we may point to three great steps which we have taken together to this end. First, the signature of the Paris Peace Pact has recorded the solemn assent of the chief countries of the world to the principle that war shall no longer be used as an instrument

of national policy, and that the settlement of disputes shall only be sought by pacific means. We have since co-operated in taking a long step towards the establishment of arbitration as the proper means of settling disputes by signing the Optional Clause. Further, in the pursuit of limitation of armaments as a method of preventing war, we have this year joined in signing the London Naval Treaty. . . . The outlook is disquieting, but should that calamity happen, it will not be the fault of our Commonwealth, which, both by precept and example, has shown the sincerity of its devotion to peace. I am sure that in our discussions we shall be able to find common ground for acting in harmony in the pursuit of these aims. One thing is clear. The members of the Commonwealth, acting simultaneously and together, can exercise an influence greatly exceeding any that can be employed by one member or series of members acting individually."

Mr. Scullin, Prime Minister of the Commonwealth of Australia, pursued the same theme:—

"One of the principal tasks ahead of us at this Imperial Conference of 1930 is to advance a stage further the great task of harmonizing the real self-determination of the Dominions with the real unity of the British Commonwealth of Nations. . . .

"In order to keep pace with the logical evolution of Imperial relations, it has become necessary for the old forms and technical limitations on our Dominion sovereignty to be abolished—and some part of our time at this Conference must be devoted to such considerations.

" . . . On the unity of the British Commonwealth may depend, in time of crisis, the preservation of international peace."

Mr. Forbes, Prime Minister of New Zealand, spoke to similar effect:—

"We readily recognise, however, that the considerations applicable to one Dominion are not necessarily applicable

to all, and that if our association together in one Commonwealth is to endure it must rest upon a basis which is acceptable to all. At this Conference it may be hoped that all question as to the status of the respective members of the Commonwealth will be finally disposed of, but with the elimination of this question arises another problem which in our view is of even higher importance."

Speaking of the need for a common policy and common action, he proceeded:—

"This is, in our opinion, the outstanding problem of the moment, and at this Conference it will be towards such a common understanding and a common policy based on adequate information that our efforts will be mainly directed. It is our hope that the Governments represented here will find it possible to divert their attention from status to co-operation."

General Hertzog, Prime Minister of the Union of South Africa, regarded the constitutional problems as having been effectively solved by the declarations of the Conference of 1926 and stressed the urgency of an economic policy for the improvement of Inter-Commonwealth trade relations. He said:—

"In 1926 the Conference busied itself mainly with inter-Commonwealth State relations, i.e. with abstract principles as to status and competency. It will be the task of this Conference, if I am not mistaken, to apply itself more particularly to the solution of questions of an economic and fiscal nature; and in doing so let us hope that we shall attain a success not less than that achieved in 1926.

"I am of course fully conscious of the very important functions devolving upon us at this Conference finally to adjust the outstanding constitutional questions consequent upon the decisions arrived at in 1926. The essentials of this task have, however, been settled for us so

exhaustively by the Report of the inter-Commonwealth Conference of last year that this portion of our labour may well be looked upon as already completed, except for the purpose of formal sanction, or the consideration of some matters of detail.

"In considering questions touching economic policy it must be appreciated that inter-Commonwealth trade relations have to a certain extent been established and extended in the past on the basis of a system of voluntary reciprocal tariff preferences."

And again:—

"However, while the intensity of its economic and industrial problems is forcing upon the world, and, therefore, also upon us, a reconsideration of the very bases of our economic and industrial life, I have, Prime Minister, no doubt that the spirit in which we shall approach the great task before us will be such as to enable us to solve our difficulties in a manner consistent with the highest interests of the Commonwealth."

The proceedings opened by these addresses aimed at final and binding—legally and constitutionally binding—arrangements for combining the national independence of Dominion status with the devising and execution of Commonwealth policy and action on co-operative lines by methods of consultation and agreement. As the British Prime Minister put it, behind their work was "the thought of building for the future." Dominion status had worked successfully in the Great War by improvised methods. In future it would have the advantage of a carefully thought out and tested machinery which should enable the Commonwealth to give effect to shared aspirations and joint action in the works of peace or war or economics. To this end the Conference disposed of the matters raised in 1926 which were:—

- (a) ⁽¹⁾ The title of H. M. the King.

This, as has been seen, was dealt with by the Royal and Parliamentary Title Act, 1927.

- (b) The position of the Governor-General.

The constitutional principles and practice laid down in 1926 are amplified by specific "statements" that

- (i) The appointment of a Governor-General shall lie with His Majesty the King acting on the advice of his Ministers in the Dominion concerned; and
- (ii) "the channel of communication between His Majesty and the Government of any Dominion is a matter solely concerning His Majesty and such Government," and
- (iii) "The manner in which the instrument containing the Governor-General's appointment should reflect the principles set forth above is a matter in regard to which His Majesty is advised by his ministers in the Dominion concerned."

- (c) The Operation of Dominion Legislation.

- (i) The powers of reservation and disallowance disappear in view of the exclusive right of the Dominion Ministers to advise His Majesty on all matters pertaining to the affairs of their respective Dominions and to advise the Governor-General as his representative.
- (ii) Extra-territorial effect is accorded to Dominion legislation by Sec. 3 of the Bill which is recommended for enactment and which was, in fact, enacted as the Statute of Westminster.
- (iii) The Colonial Laws Validity Act 1865 is repealed by Sec. 2 of the same Bill as regards Dominion legislation and a positive provision is enacted to prevent Dominion legislation being held void for repugnancy to the law of England, and the same Bill provides that the Parliament of the United Kingdom shall not legislate for a Dominion except at the request of and by the consent of the Dominion.

¹ These sub-headings are the sub-section headings of Sections of the Report of 1930.

(d) Merchant Shipping Legislation.

The overriding authority of the Imperial Parliament gives place to the co-equality of the legislation of the independent and co-ordinate legislations of the United Kingdom and the Dominions. This is effected by Sections 2 and 3 (referred to in para. (c) (ii) and (iii) above) and Sections 5 and 6 of the recommended Bill (which became the Statute of Westminster) and by virtue of the established constitutional practice (referred to in para. (c) (i) above). Uniformity of practice, which was recognised as desirable, and harmonious effect in readjusting existing procedure were secured by an agreement recommended by the Conference and accepted and acted upon by the United Kingdom and the several Dominions.

(h) The Appeal to the Judicial Committee of the Privy Council.

The Report under the caption "Commonwealth Tribunal" incorporates the following paragraph from the Report of the Expert Conference of 1929:—

"We have felt that our work would not be complete unless we gave some consideration to the question of the establishment of a tribunal as a means of determining differences and disputes between members of the British Commonwealth. We were impressed with the advantages which might accrue from the establishment of such a tribunal. It was clearly impossible in the time at our disposal to do more than collate various suggestions with regard first to the constitution of such a tribunal, and secondly, to the jurisdiction which it might exercise. With regard to the former, the prevailing view was that any such tribunal should take the form of an *ad hoc* body selected from standing panels nominated by the several members of the British Commonwealth. With regard to the latter, there was general agreement that the jurisdiction should be limited to justiciable issues arising between Governments. We recommend that the whole subject should be further examined by all the governments."

and proceeds to suggest "a solution along the line of *ad hoc* arbitration proceedings," of which "the Conference thought that this method might be more fruitful than any other in securing the confidence of the Commonwealth." And: "In the absence of general consent to an obligatory system it was decided to recommend the adoption of a voluntary system." Again, "as to the competence of the tribunal, no doubt was entertained that this should be limited to differences between governments." "The Conference was also of opinion that the differences should only be such as are justiciable." Recommendations are made as to the composition of such a tribunal—in particular that none of the personnel should be drawn from outside the British Commonwealth of Nations. Details of arrangements should be "the subject of agreement between the governments concerned."

It would appear from the silence of the Report as to the Appeal to the Judicial Committee of the Privy Council and from the positive recommendation of a system of voluntary, non-compulsory *ad hoc* arbitration limited to the treatment of differences between governments as a substitute for an established Commonwealth tribunal, that the Conference regarded the Privy Council appeal as no longer being pressed as an essential condition of Dominion status; and that its function was to recommend a substitute system along the lines indicated in the Report of the 1926 Conference. This would accord with the attitude adopted by the United Kingdom in 1926 as recorded in the last named Report.

The schedule annexed to the Report set out the provisions which the Conference recommended for enactment by the Parliament at Westminster and which was to date from December 1st, 1931. A further recommendation suggested that the Dominion Legislatures should take action and that Resolutions of both Houses in each Dominion should be passed "with a view to the enactment by

the Parliament of the United Kingdom of legislation on the lines set out in the Schedule annexed."

The work of the Imperial Conference of 1930 was admirably described, in one of the concluding speeches, by Mr. Scullin, Prime Minister of Australia, who put it in its true perspective:—

"It is very easy to make a declaration of principle, it is much more difficult to put that principle into effect. In 1926 there was a general declaration of equal status and of autonomy for the various parts of the British Commonwealth. There the Conference of 1926 left it, with the exception that they set up a Committee of Experts to recommend how the principle could be put into effect. It remained for this Conference to translate the declaration of the Conference of 1926 into acts, and it remains for the whole of the Parliaments of the various countries of the British Commonwealth to express their views on what we have done at this Conference. I believe, however, we have made very large strides. We have made considerable progress on the Constitutional side."

Upon 11th December, 1931, the Statute of Westminster was passed at the request and with the consent of the Dominions of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, as is recited in its preamble.

With its enactment the process of implementing the Dominion status as declared in 1917, which had been initiated by the Imperial Conference of 1926, was completed. The formula of the Balfour Declaration holds. The essential independence of the Dominion Legislatures—their freedom from subordination "in any aspect of their domestic or external affairs"—has received its legal recognition in the Legislature which had once claimed overriding authority. Where any exceptions to the rule were made in the

Statute they exist by the request in each case of the Dominion concerned which, for reasons of domestic policy, wished an exception to be made. When the Dominions concerned desire the exception to be removed, it will be removed.

(i) *The Irish Constitution and the Imperial Conferences 1926-31.*

How, then, did the Irish Free State stand after the work of the Imperial Conferences 1926-31 in which its representatives had participated actively? How were its Constitution and its powers of constituent amendment and the limitations imposed upon it at the instance of Britain, affected by the elucidation and practical implementation of Dominion status resulting from formal conference and unanimous agreements?

There can be but one answer.

The constitutional relationship between Ireland and Britain was regulated by the Treaty. The Treaty assured to the Irish Free State the status of a Dominion. The Irish Constitution, which was an agreed implementation of the Treaty, contained full powers of constituent amendment subject only to the provisions of the Treaty. When the Constitution was, by agreement, enacted there were differences of opinion as to what, in certain respects, Dominion status implied. The Constitution as enacted was the result of a compromise which preserved the Treaty as dominant. These doubts have now been resolved by the labours of the Imperial Conferences 1926-30—authoritatively resolved by the unanimous decisions of the Conferences and their unreserved acceptance by all the Governments of the Commonwealth. The Irish Free State, therefore, is entitled to amend its Constitution in such manner as it may desire so as to make it conformable, in accordance with the Treaty, to its Dominion status as now further defined. It will thus, at last, fully possess the status created in 1917 which

was formally offered to it as a basis of peace to end the Anglo-Irish war of 1921 and which, when that offer was accepted, was assured to it by the formal act of the British Government with the approval and sanction of all the Dominions and with the solemnly recorded approval of and formal ratification by the Imperial Parliament.

CHAPTER VII

THE ISSUES IN THE ANGLO-IRISH CONFLICT

Was the Treaty truly a Treaty? Was there a Grant of full Dominion Status?

(a) The Irish Claim

THE case for Ireland in regard to the matters at issue in the Anglo-Irish conflict has now been sketched in its main outline. It rests upon a survey, in broad scope, of the development of the British Commonwealth of Nations from 1917 onwards—of the constitutional relationship between the Dominions and Great Britain in general and, in particular, of the readjustment of the relationship between Ireland and Great Britain. And it will not have escaped the reader's notice that where the records of things done, statutes enacted, resolutions adopted, agreements executed are supplemented or illustrated by quotations of opinion it is almost without exception to pronouncements of Dominion or British Ministers speaking authoritatively in a representative capacity that reference is made. There is, therefore, but little room for challenge to any of the matter which has been adduced—even as to interpretation. For the quotations, which are almost exclusively from British sources, supply interpretation and commentary in unambiguous language.

Ireland's case, in briefest summary, is this.

Ireland was formally offered the status of a Dominion as a basis of peace to end the Anglo-Irish war of 1920-21. And one of the terms of the formal offer was that, in the event of acceptance, Ireland's Dominion status should be

assured to her by Treaty. That offer was accepted. The Treaty was formally executed and formally ratified by both high contracting parties. The Treaty itself contained certain other terms such as a Dominion, in full possession of its national rights, might accord to Great Britain by agreement without any derogation from its status—and this view of these additional terms was formulated by the Prime Minister of Great Britain in a letter written to the head of the Irish delegation for the avowed purpose of securing the adhesion of Ireland to the Treaty. Ireland, therefore, had Dominion status assured to her by Treaty without deductions or qualifications and with the benefit of all those obligations of good faith which are implicitly binding upon an honourable grantor, which require him to make good, so far as it is in his power to do so, the thing assured by him to his grantee. What, then, was this Dominion status? It was a relatively new thing. A fruit of long, slow growth, it had suddenly ripened in war-time. It comprised rights claimed, admitted, and proclaimed as resting upon agreement. Thus in 1917 it was proclaimed in general terms with the utmost formality as the fundamental principle of the Commonwealth and it was acted on in a fashion irrevocably and unmistakably fixing its essential quality. In 1921 it was again further proclaimed in general terms with no less ceremonial solemnity, and simultaneously it was offered to Ireland, and soon after accepted by Ireland. In 1922 the Irish Constitution was drafted in conformity with the Treaty, and where doubts were pressed as to the correct working out in a written Constitution of that Dominion status assured by the Treaty, the Treaty itself was imported bodily into the Constitution as its dominant element, with provisions requiring and permitting subsequent amendments of the Constitution in conformity with the Treaty. Subsequently Dominion status came to be elucidated in practical detail. In 1926 its main principles were authoritatively agreed and declared,

and steps taken to formulate the necessary changes of laws and practice and forms to give those principles their appropriate effect. This process, effected as to the substance and spirit by Resolutions of Imperial Conferences and further effected as to statutory forms by "agreed" legislation of the Imperial Legislature, was virtually completed by the Statute of Westminster, 1931. The co-equality of the freely associated nations of the Commonwealth, including the United Kingdom, was established by rendering the legislatures co-ordinate with that of the United Kingdom instead of subordinate to it. This involved not merely the abdication of the Imperial Parliament as an overriding legislative authority, which was effected by the Statute of Westminster. It involved also the surrender of the right of the United Kingdom Ministers to advise His Majesty in regard to Dominion affairs. His Majesty, as titular head of the Legislature and Executive in each Dominion, was thereafter to act exclusively on the advice of the Ministers of the Dominion concerned. This was effected by the affirmation, and unanimous acceptance, of "the established constitutional position" by Imperial Conferences and by the acceptance or ratification of the Imperial Conference Resolutions by the several constituent Nations of the Commonwealth. The legislative and executive independence of each Dominion in its own sphere being thus secured, all other readjustments of forms and practice were left to follow in due course as and when required.

Here, then, was Dominion status worked out in constitutional and legal detail by general agreement.

The year 1931 had completed that which the year 1917 had initiated. The bargain struck in 1917 was finally "set down in black and white" in 1931. It had been acted upon in most of its broad essentials in the meantime. The task, which took some fourteen years, had been to reconcile the free association of Dominions entitled to—

and largely enjoying—legislative and executive independence with the formalisms and the legalisms and the previously existing practice of an Imperial Constitution. The Dominions had ceased to be the subject states of an Empire. They had become co-equal and freely associated nations of the Commonwealth. The Imperial Crown in a Dominion was no longer the warrant of an external authority. Its powers, however originally derived, now rested upon the Dominion Constitution and were controlled by the Dominion legislature. It was preserved and honoured as the symbol of the collective purposes of the freely associated nations acting in concert by methods of conference and agreement. Difficult as the changes were to make, they were achieved to the satisfaction of all the Dominions and of Great Britain, and the results of their unanimous agreement were finally and formally embodied in the “agreed” Statute of Westminster. And in that Statute of Westminster the Irish Free State is named as one of the Dominions to whose status and rights the Statute itself and the several agreements which it implements expressly relate.

It might have been thought that there would be general agreement also that the Irish Free State was now free to proceed to amend its Constitution in such manner as might seem good to it conformably to its Dominion status as assured by the Treaty and as now authoritatively defined and agreed. But no. The Government of the United Kingdom raised urgent objection.

(b) The British Objection

Here, then, is the root of the present Anglo-Irish conflict. Here, at least, is the root of the political difference. For the quarrel as to certain disputed payments—a relatively minor matter—is a thing apart and will be treated in a separate chapter.

But though the root of the Anglo-Irish conflict is disclosed, the exact nature of the growth that sprang from it

is somewhat difficult to classify. The position is a most singular one. It has been seen (see p. 53 above) that at the Imperial Conference of 1930 the British representatives sought to deprive Ireland of the benefit of the then projected Statute of Westminster and that they only desisted in face of the unanimous disapproval of the other Dominions. The British representatives thereupon participated in the unanimous resolutions of the Conference—including those which led to the Irish Free State being in express terms accorded the full powers created by the Statute of Westminster. But although the British Government thus joined in recommending the acknowledgement of this right for the Irish Free State, and although subsequently it successfully urged the United Kingdom Parliament to give statutory expression to this unanimously agreed recommendation, it has since maintained, through the pronouncements of certain Ministers, that the Treaty forbids the Irish Free State to exercise the right thus formally established. The bar interposed by the Treaty, it appears, was a bar operating by law until the Statute of Westminster empowered its removal as a legal bar—whereupon it became a bar binding as a matter of honourable obligation. Yet the singularity of the position goes even further than that. For whilst the British Government objected to certain amendments of the Irish Constitution being enacted which were clearly within the compass of the Statute of Westminster, it had not objected to Ireland's taking advantage of other powers resting upon "the established constitutional position" as defined by the labours of the Imperial Conferences, 1926-31. Examples of this can be most succinctly given by quotation from Professor Berriedale Keith, whose authority in such matters is beyond challenge (*Letters on Imperial Relations, etc.* 1916-35, Oxford University Press, 1935):—

" . . . Mr. Cosgrave was permitted without protest to eliminate the Crown from its proper connexion with

(1) the Civil Service; (2) the armed forces; (3) the administration of justice; (4) stamps and coinage, and to ascribe to the Executive Council powers of every kind normally accorded to the Crown or its representative in Council. He was permitted to nullify the appeal to the Privy Council, and to compel the British Government to pay the sums which his Government under a Privy Council award should have paid. Mr. de Valera himself was permitted to insult His Majesty by compelling him to dismiss summarily a Governor-General whose one offence was that he resented gross disrespect by Ministers to the Crown . . . ” (p. 138).

And again:—

“In the Free State, Mr. Cosgrave, with the co-operation of successive British Governments, and most notably of Mr. Thomas, deprived the King of every vestige of influence and all legal power. There is not an act of external or internal affairs on which His Majesty can do otherwise than as bidden by the Executive Council of the State. He cannot refuse advice, he cannot dismiss a Ministry with a majority in the Dail. All his functions, now of the most limited kind in internal matters under the Constitution, are performed by a servant of the Ministry, who could not legally receive or obey an instruction from the King” (p. 145).

And again:—

“Is it forgotten that it was Mr. Thomas who, acting on a most generous interpretation of the resolutions of the Imperial Conference, handed over to Mr. Cosgrave complete and unfettered control of all Irish foreign relations without communicating his intention to Parliament, and that, when later questioned, he contented himself by referring to Mr. Cosgrave’s statements” (p. 146).

Readers, in noting a certain asperity in the language used by Professor Berriedale Keith in these quoted passages can feel assured that he is no biassed witness in favour of the Irish Free State under Mr. de Valera.

(c) The Nature of the British Objection

Where there is such obscurity as to the exact form and scope of the considerations moving the mind of British statemanship in these matters it is impossible to summarise the British objection to the Irish claim with any confidence. It is, however, permissible to point to certain tentative conclusions and to indicate the ground upon which they rest. It would appear that immediately after the final ratification of the Treaty in December, 1922, doubts arose in official circles in Britain as to the desirability of what had been done and as to its exact effect. The Coalition Government under Mr. Lloyd George had fallen in the autumn of 1922 and had been replaced by a Government under Mr. Bonar Law which introduced and passed the Constitution Bill. The new Government, although it thus completed the ratification of the Treaty, was largely influenced by those who disliked it and had only supported it most reluctantly if at all. In particular those Ministers who had been most prominently associated with the negotiations for an Anglo-Irish peace, or were responsible for the framework of the Treaty, ceased to influence policy. Mr. Lloyd George left office finally. Lord Birkenhead was banished from the Woolsack. Mr. (later Sir Austen) Chamberlain was no longer a Minister. The Attorney-General of the Coalition Government was now Lord Hewart, Lord Chief Justice of England. New views came with new Ministers. The determining voice in regard to the new relationship with the Irish Free State lay rather with the law advisers than with the Cabinet. And the new law advisers were Sir Douglas Hogg (the present Lord Hailsham) and Sir Thomas Inskip, who in their respective capacities, the former as Attorney-General and Lord Chancellor and the latter as Solicitor General and Attorney-General, have remained in the front rank of Unionist and National Government administrations down to the present day. It is perhaps

permissible to say that these two lawyers have consistently endeavoured to place a more restricted interpretation upon the terms of the Treaty settlement than the statesmen who designed it, the plenipotentiaries who signed it or the legislatures that ratified it. The weapons of forensic legalism were invoked to temper the broader conceptions of constructive statesmanship.

What resulted in 1923 will be more fully referred to in a subsequent chapter. It is sufficient at this point to say that British executive policy as regards the Irish Free State met with one very damaging set-back. The British Court of Appeal restrained an attempted infraction of Ireland's legislative and executive independence, of such a quality as to elicit this comment in a leading article in *The Times* :—

“The confusion of thought among the legal advisers of the Government is inexplicable—except on the supposition that the end would justify the means, as perhaps it has from a political point of view” (*The Times*, 10th May, 1923).

Three main conceptions appear to have inspired the new views.

The first was that the Treaty was not really a Treaty and that it was operative and binding solely because it was embodied in an Act passed by the “Imperial Parliament.”

¹ To this may be added a corollary that the Irish Free State Constitution existed in the Irish Free State because—and only because—it was embodied in a similar Imperial Statute.

The second was that the Dominion status which Ireland acquired under the Treaty was limited to what the Dominion and in particular Canada then had: and that no subsequent development of Dominion status was to apply to the Irish Free State. The corollary to this was, apparently, that

¹ As to the inappropriateness of this term in reference to the Irish Free State see p. 148-9.

what the Dominions and in particular Canada then had was to be judged by what they had under statute law and according to the current formalisms and not what they had or had become entitled to by constitutional right.

The third was that the Dominion status which Ireland acquired under the Treaty necessarily implied, *inter alia*, the appeal to the Privy Council. The corollary to this was that the Privy Council therefore would have the sole ultimate authority to decide just what the Treaty did or did not amount to and just what the Dominion status of 1921 did or did not amount to, and to control the Constitution, all amendments of the Constitution and everything done under the Constitution accordingly.

These three conceptions, which go to the root of the present Anglo-Irish conflict, lie open to the obvious comment that they savour of an antique and sublimated legalism that disregards those beneficent principles which modern jurists hold to be binding on the conscience of any Court. And it must be added that to Irish people at least they appear to be inconsistent with good faith on the part of the nation that invited them to enter into a Treaty and carried that Treaty through to final ratification. Nor can acceptance of them ever be exacted from the Irish Free State save by *force majeure*.

The first conception can be related back to an ill-omened precedent wherein the very same legalism wrought havoc to the cause it was invoked to aid. Professor Berriedale Keith writes:—

“Further the Conference” (Imperial Conference, 1930) “approved the abolition of the doctrine of the supremacy of Imperial legislation in its application to the Dominions. . . . This was a far-reaching innovation in point of form, for the assertion of Imperial supremacy, made in 1766 as a challenge to the repudiation of that supremacy by the American colonies, was renewed in 1922 in respect of the Irish Free State” (*An Introduction to British Constitutional Law* (1931), p. 164).

There was, however, as the writer observes, little change in substance in these decisions, for Imperial legislation in regard to the Dominions had long been confined to legislation desired by the Dominions. Thus the inconsistency of renewing the older precedents in dealing with the latest Dominion is clearly seen.

The second conception, if substantiated, would mean that Ireland in getting Dominion status by the Treaty merely got the obsolete legal shackles binding a colony to subordination without the benefit of the constitutional practice and doctrine which already fully controlled them in the case of such colonies as had in 1917 attained Dominion status. This, to use a homely image, is as if a vendor sold an admittedly pregnant cow and subsequently repudiated the right of the purchaser to the calf when in due course it was born.

The third conception means that the Privy Council was placed permanently and irrevocably astride of the Irish Constitution. Britain was to be judge in her own case—or, rather, to be more precise, a British tribunal, sitting in a British atmosphere, manned by judges appointed and paid by the British Government, applying British standards of thought and public policy and administering British law and the statutes of the "Imperial Parliament" was to decide all questions arising out of Britain's contract or Treaty with Ireland. It is difficult to think of any parallel under the civil law to such a relationship—unless indeed the case of an adult citizen who has voluntarily subjected himself and his affairs to the control of a Committee in Lunacy.

Of all three contentions it may be asked how they came to be deemed to be consistent with the whole course of conduct of Great Britain in participating with the Irish Free State in all the proceedings of the several Imperial Conferences of 1923, 1926, 1929 and 1930 and in adopting and confirming the agreed resolutions to which all the co-equal members subscribed. Can there be any doubt that

a shattering blow will have been delivered to the methods of Conference and agreement if, after results have been achieved, the whole proceedings can be negatived retroactively as to a particular member nation by a technical legalism which, if it had been intended that it should be preserved as operative and valid, should have been tested at the outset?

So extravagant do these contentions—and their logical consequences—appear to be, that it is necessary to establish their existence by quotation of exact words. Sir Thomas Inskip, as Attorney-General addressing the Privy Council as *amicus curiae* said, in reference to the right of appeal:—

“If implicit in Article 2 it is law, because the Treaty was given the form” (sc: “force”) of law and is not merely a Treaty subject to renunciation” (Moore *v.* The Attorney-General of the Irish Free State, 1935. App. Cas. p. 483).

and, again, having regard to his admission that in so far as the Treaty was United Kingdom law the Irish Free State was empowered by the Statute of Westminster “to abrogate” it, he said:—

“But, also, having regard to the contractual obligations under the Treaty, the Irish Free State Legislature is not free to abolish the right of appeal to His Majesty in Council” (same as above, p. 489).

For a clear exposition of the doctrine that Ireland is bound by what Canada had by law in 1921, but must not be allowed to have what Canada got by law through the Statute of Westminster in 1931, a long quotation is necessary from the speech of Sir Thomas Inskip, as Solicitor-General, replying on behalf of the Government to the Second Reading debate on the Statute of Westminster:—

“The legal position is not always agreed by everybody to be exactly what I, for one, claim it to be. I have no

doubt at all, and I believe that all my hon. friends will agree with me, that it is implicit in Article 2 of the Treaty that the right of granting special leave to appeal to the Privy Council is part of the Constitution of the Irish Free State. That is not the opinion of the representatives of the Irish Free State. We differ on that point. I suggest that the right of appeal to the Privy Council is implicit in Article 2 and I believe that every constitutional lawyer in this country would say that that is the case. The Irish Free State is based upon the model of Canada. Canada in 1921 had the right of appeal to the Privy Council and so we say that the Irish Free State has the same right of appeal.

"The argument of the Irish Free State is that since 1921 there have been constitutional developments in the relations between the Dominions and Great Britain, that when in 1926 the Balfour Declaration was made granting not independence but autonomy to our self-governing Dominions, this characteristically British development of granting autonomy to our self-governing Dominions resulted in the same position being given to the Irish Free State—namely, that Canada, if she pleased, can unilaterally without our concurrence get rid of the right of appeal to the Privy Council. That is not the view of His Majesty's Government, and it is fair to say that the Attorney-General and other representatives of the Crown, and the Prime Minister, have made it plain that the right of appeal to the Privy Council is an essential part of the obligations as between this country and Ireland. If we put it into the Bill it will not dispose of the view held by the Irish Free State, and once again we come back to the question as to whether it is better that this matter should be discussed by concurrence and agreement between the two Parliaments and Governments of two equal Dominions, ourselves and this Dominion, or whether we should try and force our legal view upon the Irish Free State—we may conceivably be wrong in our view, although I do not think we are—and say that we will put it into this Bill and bind the Irish Free State to the view we hold" (Hansard, 20th November, 1931. Col. 1252-3).

It will be observed that Sir Thomas Inskip did not anticipate Lord Hailsham's disclosure of a few days later to the House of Lords (see p. 53 above). The House of Commons, therefore, remained unaware that it was only because of the pressure exercised by the other Dominions that the Government had abstained from attempting to "force our legal view upon the Irish Free State" by an express exception of the Irish Free State from the benefit of the Statute of Westminster.

The clearness with which Sir Thomas Inskip phrased his argument renders it unnecessary to multiply quotations. Sufficient to mention that the right of the Irish Free State to amend its Constitution in several respects has been formally challenged on several occasions since 1931 by Mr. J. H. Thomas, as Secretary of State for the Dominions, and by Lord Hailsham either as Minister for War or as Lord Chancellor speaking on behalf of the Government in the House of Lords.

The Judicial Committee of the Privy Council in 1935 has crossed the *t*'s and dotted the *i*'s of Sir Thomas Inskip's argument. In 1935 it laid it down that:—

"the Constituent Act and the Constitution of the Irish Free State derived their validity from the Act of the Imperial Parliament, the Irish Free State Constitution Act, 1922. This Act established that the Constitution, subject to the provisions of the Constituent Act, should be the Constitution of the Irish Free State. . . . The action of the House of Parliament was thereby ratified; apart from such ratification that body had no authority to make a Constitution; all the authority it originally possessed was derived from the Irish Free State (Agreement) Act 1922, Sec. 1, Sub-sections 1 and 2" (*Moore v. The Attorney-General of the Irish Free State*).

And again:—

"The Treaty and the Constituent Act respectively form parts of the statute law of the United Kingdom, each of

them being parts of an Imperial Act" (*Moore v. The Attorney-General of the Irish Free State*).

Thus in wide and far-reaching terms it affirmed the legislative supremacy of the Imperial Parliament—with special reference to the Irish Free State—up to the date of the Statute of Westminster. And it intimated its view with sufficient clearness—though not in form expressly adopting the view propounded by Sir Thomas Inskip—that the Treaty precluded the Irish Free State from exercising the legal powers which it was constrained to admit that the Statute of Westminster conferred upon the Irish Free State by name. Thus after describing several Acts of the Oireachtas as not being within the terms of the Treaty it concluded:—

"It would be out of place to criticise the legislation enacted by the Irish Free State Legislature. But the Board desire to add that they are expressing no opinion upon any contractual obligation under which, regard being had to the terms of the Treaty, the Irish Free State lay. The simplest way of stating the situation is to say that the Statute of Westminster gave the Irish Free State a power under which they could abrogate the Treaty, and that as a matter of law they have availed themselves of that power" (*Moore v. The Attorney-General of the Irish Free State*).

There is no passage in the judgment of the Judicial Committee of the Privy Council to indicate that it had considered, or even indeed was aware of, the extreme difficulties involved in such alternations of authority as between the Treaty and British statute law—in the subordination of the Treaty to that law from 1922 to 1931 and the subordination of that law to the Treaty from 1931 onwards. Nor indeed—in a unilateral discussion—does anybody appear to have sought for a solution which could harmonise the relationship of Treaty and law—especially having regard

to the fact that the law in question had issued from further conventional engagements between the two countries, the unanimously agreed Resolutions of the Imperial Conference, 1931, as implemented by the "agreed and consented to" Statute of Westminster.

(d) Testing the Issues.

Now it is necessary to remember that the Judicial Committee of the Privy Council does not speak for the Government of the United Kingdom in Anglo-Irish relations. Nor can it control the action of that Government when its action is the action of the Three Estates of the Realm. The Judicial Committee, as a judicial tribunal, is bound by Act of Parliament to which it must give effect, as occasion arises, according to the plain intention of the Legislature. It is equally bound by Acts of State in the sphere of the executive functions of the Government where, as in the making of Treaties, they issue from the prerogative of the Crown and are confirmed by the Legislature. It has, of course, the right to advise, if requested to do so, upon issues formally submitted to it by the Government—but this function has no relevance to the present subject. The State is supreme.

If the Anglo-Irish Treaty was in fact a treaty and intended by the United Kingdom Legislature to be a treaty, the Judicial Committee is bound to recognise it as a Treaty. It has as little right or competence to disregard—or by arbitrary interpretation to defeat—the statutes by which it was ratified as it would have to repudiate the Peace of 1783, which set the North American Colonies free, as being inconsistent with the statute authorising George III to make peace.

Nor has the United Kingdom Government made formal claim in its direct dealing with the Irish Free State that the Treaty was something other than a treaty. Neither before

nor since have they committed Britain definitely to the legalistic view so starkly enunciated by the Judicial Committee. But there has been ambiguity. Ministers have on occasion informed Parliament that Britain is bound by the provisions of the Treaty because it is embodied in a British statute. It would have been more accurate, perhaps, to say that Britain is bound because its honour and good faith were engaged by a ratified agreement and that the Government possessed the necessary powers, according to British municipal law, to fulfil its engagements, inasmuch as the instruments of ratification provided a statutory implementation of that agreement from the British side. On the other hand, there have been many declarations at different stages that Britain intended to honour the Treaty both in the letter and the spirit, and—especially since the Statute of Westminster—great stress has been laid by British Ministers upon the contractual obligations binding upon the Irish Free State in virtue of the Treaty. Professor Berriedale Keith, indeed, has on several occasions pointed out the inconsistency of the British case in the Anglo-Irish conflict in that it is based in part upon the view that it lies in the domain of British municipal law and, in part, upon the view that it lies in the domain of international law. No one in authority on the British side has so far thought it worth while to explain how the Anglo-Irish Treaty can, at one and the same time, be an arrangement imposed by law in virtue of the supremacy of the Imperial Parliament and a compact involving reciprocal obligations of contract and good faith. In the early days after the Treaty when discussion of this subject began Lord Birkenhead (who as Lord Chancellor had signed the Treaty) in a judicial utterance in the House of Lords said:—

“Nor are we concerned, if the view which I have formed is well-founded, with the various constitutional provisions which brought into being the Irish Free State.

These instruments, whether conventional or statutory, are only material in regard to the merits of the controversy; and with these merits I have made it plain that we have nothing to do" (Secretary of State for Home Affairs *v.* O'Brien, 1933, App. Cas. p. 603).

It did not occur to that penetrating intelligence that anyone could possibly argue that the antithesis was non-existent because they were both conventional and statutory.

The doctrine that the Treaty was not "really" a Treaty, but that it and the Constitution which arose from it comprised a settlement imposed by the Imperial Parliament in virtue of its legislative supremacy has secured apparently the approval of the present or recent personnel of the Judicial Committee of the Privy Council. But it has by no means commanded the assent of some of the most eminent of British—quite apart from Irish—lawyers. It appears to rest upon a combination of three different grounds. These are:—

- (i) The legislative supremacy of the Imperial Parliament.
- (ii) The Treaty was given "the force of law" by the Imperial Parliament.
- (iii) There could be no Treaty between a monarch and his rebellious subjects.

These arguments may be examined in summarised form in the light of the antecedent circumstances outlined in preceding chapters.

(i) "*The Legislative Supremacy of the Imperial Parliament.*"

The legislative supremacy of the Imperial Parliament is a term which accurately describes the authority of the Parliament of the United Kingdom (of which the Irish Free State is not a part) in relation to the British Empire, minus those Dominions which since at least 1917 have been

co-equal partners of the "British Commonwealth of Nations." In regard to the latter in 1921-22 nothing remained in constitutional law and usage of Imperial supremacy save the empty husks of ancient formalisms. In constitutional principle, in current usage, and by claim and admission it had ceased to exist.¹ On the other hand, in regard to the Irish Free State, the legislative supremacy of the Imperial Parliament has no relevance, actual or historical. The settlement of 1921 represented a compromise between conflicting positions—in the Irish view a sovereign independent Irish Republic merged itself into the qualified relationship with Britain termed Dominion status, whilst, in the British view, the Kingdom of Ireland ceased to be part of the United Kingdom and became, in virtue of its new Dominion status, a co-equal member of the group of nations forming the British Commonwealth of Nations. In neither view did the supremacy of the Imperial Parliament necessarily apply either before or after the Treaty. In the one view, the Irish Republic existed to deny it. In the other, Ireland, as a part of the United Kingdom and represented fully at Westminster, shared in the exercise of that legislative supremacy over the subordinate units,

¹ At the Imperial Conference, 1918, a discussion as to Empire shipping led to references to the legislative supremacy of the Imperial Parliament on the 26th July. The following extract from the proceedings shows its nature and quality as of that date:—

Sir Robert Borden: "With respect to what Sir Joseph Ward has said as to the power of the Imperial Parliament. I should like to make my position perfectly clear. It is quite true that the Imperial Parliament has legal power to legislate throughout the Empire. It has not, however, the constitutional right, and these questions are governed by constitutional right and not by legal power. It would, therefore, be entirely improper for the Imperial Parliament to attempt to pass legislation creating a Tribunal which should act within the Oversea Dominions in the manner suggested, unless that was done at the request of the Governments concerned."

Mr. Hughes: "Precisely. That is the only circumstance under which it could."

Sir Joseph Ward: "I quite agree."

Such was the official view in 1918 of the Prime Ministers of Canada and Australia and of the New Zealand Minister of Finance regarding the legislative supremacy of the Imperial Parliament. Its expression passed without question by the official British representatives, including the Secretary of State for the Colonies, who was Chairman of the Conference.

but was no more subject to it than Scotland or Britain itself. And if, going further back to the Act of Union of 1800, we scrutinise the nature of that arrangement, we find that it purported to be a union to which Ireland, enjoying since 1783 an admitted legislative independence, voluntarily assented. Thus a legislative supremacy of the Imperial Parliament over Ireland simply did not exist. There did exist, however, the authority of the United Kingdom legislature to legislate for Ireland as part of the United Kingdom—an authority which, hotly contested on either side, was the principal issue in the war which the Treaty was negotiated to terminate by a compromise. And that compromise, quite obviously, both on the facts of the case and on the machinery adopted to effect it, comprised—*inter alia*—the legislative independence of Ireland, to be set up by an implemented Agreement and not by a subject's acceptance of a sovereign's authoritative gift. It was, on the face of it, an agreement *inter pares* and it resulted in Ireland's national co-equality of status. There was no room here for "the legislative supremacy of the Imperial Parliament."

Nor, it must be admitted, was there anything said or done by the British Legislature or by representative British statesmen or lawyers at the time to warrant any suggestion that, in passing the Irish Free State (Agreement) Act, 1922, and the Irish Free State Constitution Act, 1922, they were doing anything other than ratifying and implementing the Treaty. On the contrary, they were particular to insist upon the necessity for compliance with the Treaty, as a treaty, in every respect. It is, of course, true that to comply with the formalisms and precedents of Dominionism the Irish Constitution was incorporated in a statute of the United Kingdom Parliament. But in these cases the legal formalism is tempered by constitutional right: and between the date of the most recent of Dominion Constitutions and the date of the Irish Free State Constitution that constitu-

tional right had been greatly enlarged. On this occasion the legal formalism which clothed the constitutional fact was also portion of an agreed procedure to effect final ratification and implementation of the Treaty by signifying that the Constitution, in the eyes of Britain, was in full accord with the Treaty.

Again it is too often overlooked or ignored that the British Legislature recited as the basis of its action (set forth in the Preamble to its Act) that the Constituent Assembly in Ireland had already "passed the Measure" which "declared" the Constitution. There is thus a statutory admission of the validity of the proceedings of the Irish Constituent Assembly—an admission which accurately reflects the opinion in 1921 of both the British and the Irish Governments that these proceedings were soundly based on Article XVII of the Treaty. The force of this admission cannot be evaded. Whatever else the preamble to a statute may or may not effect, it is quite clear that it sets forth a state of facts in view of which the subsequent provisions are enacted. And in accordance with accepted principles of statutory interpretation the recitals in the Preamble may be taken as furnishing a key to the intention of the Legislature in construing those provisions.

Thus the British statute enacts the Irish Constitution in view of the fact that that Constitution has already been enacted and "declared" by "the House of Parliament constituted pursuant to the Irish Free State (Agreement) Act, 1922, sitting as a Constituent Assembly for the settlement of the Constitution of the Irish Free State." (See Appendix, p. 309.) Could words more apt or methods more precise have been used to signify adoption of the thing done and of the procedure employed in doing it to effect ratification of the Treaty settlement which they were, by both high contracting parties, intended to complete?

Again, *ex hypothesi*, "the legislative supremacy of the Imperial Parliament" was exercised in enacting the Treaty and the Constitution and it continued to be legally exercisable until 1931, when the Statute of Westminster set the Dominions free. But is not this view absurdly inconsistent with what the Irish Constitution and the British Legislature actually did in 1922? Is it not a fact that in this and other aspects of Dominion status the Constitution, and the Treaty settlement as a whole, clearly anticipated the Statute of Westminster by giving legal form to constitutional right? Whether the United Kingdom Legislature imposed the Constitution or merely assented to it, makes no difference in this regard. The Irish Constitution in clear language declares the legislative independence of Ireland:—

Article 2

"All powers of government and all authority legislative, executive, and judicial in Ireland, are derived from the people of Ireland and the same shall be exercised in the Irish Free State (Saorstát Éireann) through the organizations established by or under, and in accord with, this Constitution."

Article 12

"A Legislature is hereby created to be known as the Oireachtas. It shall consist of the King and two Houses, the Chamber of Deputies (otherwise called herein generally referred to as 'Dáil Éireann') and the Senate (otherwise called and herein generally referred to as 'Seanad Éireann'). The sole and exclusive power of making laws for the peace, order, and good government of the Irish Free State (Saorstát Éireann) is vested in the Oireachtas."

The British Legislature adopted these words by enacting or ratifying the Constitution. Realising their full import

it inserted Section 4 in its own Irish Free State Constitution Act—though not, of course, in the Constitution itself—in order to preserve its own constitutional right according to the usages of **Dominionism**:—

“Sec. 4. Nothing in the said Constitution shall be construed as prejudicing the power of Parliament to make laws affecting the Irish Free State in any case where, in accordance with constitutional practice, Parliament would make laws affecting other self-governing Dominions.”

The enactment of this saving clause by the unilateral action of the British Legislature was of little moment save that it pointed to the maintenance of uniformity in the practice of **Dominionism**. It was not inconsistent with the Treaty. Nor had the Irish Government occasion to object. It affected no Irish right. The constitutional practice¹ which was preserved limited such legislation to cases, as later in the Statute of Westminster, where the Dominion affected requested, or consented to, it. Nor, again, was the British Parliament inadvertently left in ignorance of the full purport of what was being done. The clause was challenged in debate on the ground that it was cutting down the power of Parliament. A great lawyer thereupon explained to the House of Commons, in reply to this objection, that it was necessary to preserve the right of Parliament to legislate in accordance with constitutional practice in view of Article XII as to the sole right of the *Oireachtas* (Sir John Simon, *Hansard*, 28th November, 1922. Cols. 563-4).

Where in all this is there evidence of any intention of the United Kingdom Parliament to claim or to exercise a legislative supremacy in the very act of formally enacting or ratifying the legislative independence of the Irish *Oireachtas* as established by the Irish Constituent Assembly?

¹ See the words of Sir Robert Borden above (p. 148 note).

So much for the intention of the United Kingdom Legislature as it may be gathered, as it has to be gathered, from matter within the four corners of its own enactment. But it is legitimate to supplement the argument with evidence of what was in the minds of the British legislators. The following quotations afford a striking picture of how the matter was presented to Parliament.

In the House of Commons the Attorney-General, Sir Douglas Hogg (now Lord Hailsham), said:—

“I am quite prepared to state on behalf of the Government that we regard the whole of the Treaty as absolutely binding, and unaffected by anything in the Constitution. It is only on that express understanding that the Constitution was accepted, and the Irish Parliament has expressly enacted the Articles of the Treaty in this very Statute, which includes Article 7. . . .”

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“The question is not whether we think this a good Constitution or a bad Constitution, but whether we on this side of the House are going to carry out the pledge which has been given to the Irish people to enact the Constitution so long as it complies with the Treaty” (Hansard, 28th November, 1922).

In the House of Lords Viscount Haldane, an erudite statesman and a great lawyer, twice Lord Chancellor of England, was even more forcible from his independent standpoint. It will be seen that he spoke with a due sense of his responsibilities as one charged with the exercise of judicial functions, and limiting himself to defining just what it was that Parliament was doing:—

“Like the Noble Marquess” (Lansdowne) “I have sat silent during these debates, but for a different reason. It may fall to me in the course of judicial duties to have to interpret this Constitution, and I should feel myself in danger of being embarrassed hereafter if I had said

much at present. That about which I do wish to say a very few words now is the broader point which was made by the Noble Marquess. . . ."

"The Noble Marquess has complained that this Constitution has not been debated by Parliament, but that it has been produced in Ireland, brought over by the Government, adopted by them, and rather forced upon Parliament. I think, in a limited sense, that is true. But is it consistent with the nature of the situation that any other course should have been taken? What is this settlement that we have made? It is the settlement of a bloody warfare. It is a truce made almost literally upon the field of battle. . . ."

"All our efforts and all our expenditure would have helped us no further on. Therefore, the Government made a Treaty on the field of battle. That is why the Treaty is so sacred. It was a Treaty between two opposing forces. I dare say the people of Ireland realised as clearly as the people here that the contest was an unequal one, and relied on our not pushing it to its conclusions, but, as we were pushing it, and had begun to push it fairly hard, they thought it better to make a peace, and that peace is embodied in the Articles of Agreement. That is why the Articles of Agreement did not come before Parliament. You do not make a truce, you do not make the terms of Armistices, you do not even make the treaties which embody them, in Parliament. The Government must be responsible for them, for better or for worse. That is always so when you are dealing with war. . . ."

"All this shows that in this matter we have only two alternatives. You may conquer Ireland, or you may carry out the peace you have made with Ireland on the battle field. You must do one or the other" (Hansard, 4th December, 1922. Cols. 217-220).

Lord Haldane was speaking on the Irish Free State Constitution Bill which shortly afterwards received its Third Reading unopposed. Not only did his explanation of the purport of what was being done pass without challenge,

but it received effective endorsement from the speech in which the Secretary of State for the Colonies, the Duke of Devonshire, concluded the debate on behalf of the Government:—

“We, as a Government, could have made it clear from the very outset of the Election that we were not bound by any treaty which had been made before we came into Office. We were committed to no promise. We had a clear field, and we could take what action we wished. After full deliberation the Prime Minister committed himself to the policy of carrying out the legislation necessary for the implementing of the Treaty” (Hansard, 4th December, 1922. Col. 231).

Thus the parliamentary debates are seen to have been fully in accord with the terms of the enactments that resulted from them. The Treaty was the central factor in the situation. It was also to remain the dominant document controlling the position. The Treaty was ratified and implemented. The forms of Dominionism were employed in enacting the Constitution and, in the doing of it, the constitutional principles of Dominionism were simultaneously given express statutory effect by Sec. 4 so as to impose upon Parliament the limits of constitutional practice. Thus for the Irish Free State the legal power of Parliament was legally curtailed from the outset—in logical anticipation of the same thing being done later on for the other Dominions by Sec. 4 of the Statute of Westminster in 1931.

There is a different sense in which the conception of the legislative supremacy of the Imperial Parliament may be thought appropriate to this discussion. The Parliament of the United Kingdom is the supreme authority in a sovereign state. It is free to do as it will. Its acts are subject to no revision or control. The legal tribunals of the United Kingdom must submit themselves to its will and must

give effect to its intentions statutorily expressed. Neither of the two final appellate tribunals, the House of Lords and the Judicial Committee of the Privy Council, can disallow its act or question its right to have acted, nor the basis or aim in view of which it acted. If the Legislature disapprove the interpretation of its own laws by these tribunals it is free to amend those laws forthwith in order to effect its purpose—even with retro-active effect if that be deemed desirable. And it is at any moment supreme in the sense that it is not bound by its own previous acts. The sole restraints upon its power are moral restraints, self-adopted, such as considerations of public policy, Christian morality, national honour, contractual obligation and the like, and the limits of physical possibility. This is exemplified by the old saying that an Act of Parliament could do anything—except change a man into a woman. The Legislature is, thus, free to pass an Act to abolish the North Pole or to control the weather. But it will not do so because it knows that its Act would remain inoperative. In short, the supremacy of the Legislature is limited by self-control in the light of certain moral considerations, and legislation is usually confined to effecting something within the sphere of the normal executive functions of the State—things outside that sphere being dealt with when necessary by the Executive acting in virtue of the Royal Prerogative.

Thus legislative supremacy in this sense is but an ordinary attribute of national sovereignty. It implies no inherent right—as distinct from law, fact and history—to a control over others. The self-imposed restraints inhibit any effective assertion of such an alleged inherent right save as a prelude to a war of conquest. The concluding observation of Lord Haldane, as quoted above, bears witness to that.

It is instructive to compare the view of Sir Thomas Inskip which, as Attorney-General and *amicus curiae*, he

submitted to the Judicial Committee in 1935 in putting forward the doctrine of the legislative supremacy of Westminster:—

“He should submit that the United Kingdom Parliament at that time clearly could have passed a law repealing the Treaty, or repealing the Constitution, in legal theory, but constitutionally he” (Counsel) “said, no. It would also have been a breach of the obligation contained in the Treaty, and nobody could have conceived that the Imperial Parliament would have exercised that power” (*The Times*, 12th April, 1935, in *Moore v. The Attorney-General of the Irish Free State*).

Now, whilst the available reports do not contain the development of this view, it may be taken as fairly clear that Sir Thomas Inskip was referring not to a legislative supremacy in Ireland, which had been abolished by statutes of 1782 and 1783, but to the legislative supremacy of Westminster over the Dominions. This, as has been seen, was a supremacy resting originally upon law but controlled by constitutional principle. That is the first cause of Counsel’s “no.” The second was that the Dominion position was secured to Ireland by the Treaty. Sir Thomas Inskip’s argument, which was accepted by the Court was—apparently—that inasmuch as Ireland received Dominion status the various instruments effecting this change must be treated as being of identical quality with the Dominion constitutions, that is, as being British statute law controlled by constitutional principle, and that Britain would be precluded from exercising the legal right by the doctrines of Dominionism as well as by the Treaty which gave Ireland the benefit of them. The answer was not given, as the Irish Free State—having abolished the Privy Council appeal—was not represented at the hearing. But the answer, if given, surely must have been that so violent an effort at uniformity of treatment was unwarranted by the very provisions them-

selves of the statutes whose supreme authority Sir Thomas Inskip was seeking to establish. They employed a different procedure to attain a different result—having regard, doubtless, to the fact that Dominion status in Ireland sprang from a wholly different root. Thus Parliament, having approved the Treaty, as has been seen, adopted the procedure and action of the Irish Constituent Assembly in passing the measure which declared the legislative independence of the Irish Free State; and, in embodying that measure in its own statute of ratification, renounced all legal claim to legislative supremacy over the Irish Free State, as effectively as it did subsequently by the Statute of Westminster as regards those Dominions that chose to benefit by it. But the attention of the Court does not appear to have been attracted to the specific nature of the detailed provisions of the Treaty settlement upon which it proceeded to pronounce at large. Had it been otherwise it would have become clear that, in the categories of laws to operate in future in the Irish Free State, Parliament in 1922 had left no place for the Colonial Laws Validity Act, 1865, which figured so prominently in the argument upholding the legislative supremacy of the United Kingdom Parliament. (See p. 112 above.)

And so the legalistic thesis was sustained—after a one-sided discussion. It involved a double paradox of a sufficiently startling character. A Legislative Supremacy conjured into being by a concession of co-equality: and a ratification of a Treaty destroying the whole covenanted basis of its terms.

(ii) *The Treaty was given "the force of law." With what intention and effect?*

There are some who profess to derive a confirmation of the legislative supremacy of Westminster from the provision of the Irish Free State (Agreement) Act, 1922,

Sec. 1, Sub-sec. 1 that the Treaty "shall have the force of law as from the date of the passing of this Act." It is to be remembered, in this connection, that it was also given the force of law in the Irish Free State by the Constituent Act passed by the Irish Constituent Assembly and subsequently scheduled in the British Act.

The proposition appears to be that the Treaty, being thus British law and being declared to affect the Constitution as a fundamental or governing condition, controls by virtue of British law everything in the Treaty settlement and in the Constitution—even to the extent of inferentially introducing a "not" into some of the most positive of precise enacting words in both Treaty and Constitution. Thus the legislative supremacy of Westminster would be maintained for all purposes upon the face of the agreed and imposed Irish Constitution which enacted legislative independence for Ireland. It would even extend support to a suggestion that a Dominion status, so qualified in the creation of it by the instruments which brought it into being, was something different from what the other Dominions had. There are even those who profess to find in the terms of Article 18 of the Treaty a differentiation between the two bodies to which it was to be submitted for approval in such manner as to limit ratification to action to be taken by the United Kingdom Parliament.

The answer assuredly must be that the according of the force of law to the Treaty by the two Legislatures was, and was plainly intended to be, a provision rendering the Treaty operative as a portion of the municipal law of each of the two high contracting parties respectively. In other British statutes confirming or ratifying treaties there are provisions of parallel import. Thus, to take the most conspicuous, in the case of the Treaty of Versailles, Parliament enacted (9 and 10 Geo. V. cap. 33) in 1919:—

"Sec. 1 (1) His Majesty may make such appointments, establish such offices, make such Orders in Council and

do such things as appear to him necessary for carrying out of the said Treaty and for giving effect to any of the provisions of the said Treaty."

This Act was referred to by the present Attorney-General, Sir Donald Somervell, in the House of Commons on 20th November, 1931:—

"Two things have to be kept distinct. One of them is the obligations imposed on the parties by the Treaty and the other is quite a different point as to whether either or both parties can choose in their wisdom to give the terms of that treaty legislative sanction by passing an Act of Parliament making its terms the law of the land. This House passed an Act under which an Order in Council was made giving legislative effect to certain sections of the Treaty of Versailles and under that Order those sections have and had the full force and effect as laws. If the Order in Council had been repealed it would be absurd to suggest that the repealing of that Order would in fact repeal the Treaty of Versailles or affect the obligations of His Majesty's Government to other signatories to the Treaty" (Hansard, 20th November, 1931. Col. 1224).

He might have added that it would be equally absurd to suggest that the Order in Council had any effect in imposing the Treaty on any of the other signatories.

The test in considering these two Acts is, "What was the intention, having regard to the express terms used and the whole scope, purport and tenour of the transaction, the subject matter upon which the Act was to operate?" The answer is logically inevitable: "To give the fullest possible effect to the Treaty which it was implementing as well as ratifying. The transaction involved the recognition that ratification of the Treaty by the other party was the necessary condition of that other party's being itself bound by the Treaty and could not have aimed at imposing the

Treaty provisions upon that other party in a manner, and in virtue of a claim of right, inconsistent with the Treaty which was being ratified. It would be absurd to ratify the grant of the co-ordinate rights in such a way as to impose a position necessarily subordinate. The according of the force of law to the Treaty was ancillary to, and not in conflict with, the main purpose of ratification." The words in question, so far as the British Act is concerned, are contained in one out of five subsections of the section of the Act directed to this purpose; and the remainder of the section is mainly conversant with the making of Orders in Council and deals with subsidiary arrangements "for the purpose of giving effect to Article 17 of the said Agreement."

This view is entirely consonant with that expressed in 1927 by the Lord Chancellor, Lord Cave, in the case of *Wigg v. The Attorney-General of the Irish Free State* (1927 App. Cas. p. 674). In this case certain Irish civil servants were claiming the benefit of Article 10 of the Treaty in regard to retiring allowances. Lord Cave held that they were entitled to sue inasmuch as Article 78 of the Irish Constitution had imported the substance of Article 10 of the Treaty into the municipal law of the Irish Free State. The headnote of the Report begins: "Held, that Act 1 of 1922 of the Irish Free State" (the Irish Free State Constituent Act establishing the Constitution) "gave the Appellants a legal right to the benefit of Article 10 of the Treaty enforceable in the courts of that State" The same view was expressed on the further consideration of the case by the Judicial Committee in 1929 by the Marquis of Reading, former Lord Chief Justice of England:—

"In December, 1922, the Irish Free State was established, and the Constitution was enacted by No. 1 of the *Dail Eireann*. . . . This statute made the Articles of the Treaty part of the municipal law of the Irish Free State" (1929 App. Cas. 242).

These decisions are not consistent with the alleged operation of the Treaty in the Irish Free State as a portion of its statute law imposed by the United Kingdom Parliament.

The purpose in view was plainly ancillary and a convenience in the administrative sphere. The dislocations resulting from the new régime and from the segregation of the two administrative systems involved numerous acts, and probably payments or adjustments of account, where official action required to be based on, and vouched by, express statutory authority. The Treaty became British law on 31st March, 1922. Next day came the Order in Council providing in detail for the transfer of the bulk of the administrative machine. It is to be noted that by the United Kingdom Act, the Treaty was only accorded the force of law as from 31st March, 1922. Thus its force as law derived from the United Kingdom Act provided no warrant for, or indemnity in respect of, the actions of the Executive Government in pursuance of the Treaty from 6th December, 1921, up to 31st March, 1922. That warrant and that indemnity (or right to indemnity) could only issue from the ratification of the Treaty as a treaty which, of course, operated as from the date of its signature. Were it not for that ratification the Ministers responsible for handing over control of Ireland to a Provisional Government of "armed rebels" would, in the eyes of British law, have been liable to impeachment.

For the rest, the argument that Article 18 of the Treaty implies that ratification resting upon the necessary legislation is to come from the United Kingdom alone appears to do violence to plain enacting words and plain intention as well. Support is sought for it in certain words in Article 11 which provide that for a period of "one month from the passing of the Act of Parliament for the ratification of this instrument . . ." a special arrangement shall obtain in regard to Northern Ireland. That, of course, is a

reference to the British Act of ratification and its exact date. The selection of this definite date, where a definite date was requisite, does not in any way negative the presumption that there would be an Irish ratification of the same, or a slightly different, date. On the other hand, Article 18 requires that the Treaty shall be forthwith submitted for approval to two bodies representative respectively of the two high contracting parties "and if approved shall be ratified by the necessary legislation." The Irish body was an *ad hoc* body whose purpose and constitution are prescribed in the preceding Article 17. (See Appendix p. 306.) It is a parliamentary body, elected for constituencies in Southern Ireland, and it is to be the provisional Parliament linked with the Provisional Government to which the British Government is to hand over the powers and machinery requisite for the discharge of its duties. It did, in fact, approve of the Treaty—with the result that the Provisional Government was thereupon established with the full assent of the British Government. And, after a General Election, it enacted the Constitution and thereby completed the ratification of the Treaty on the Irish side; the parallel British Act—also after a General Election—following a few days later. There was thus on both sides an exact compliance with the terms of Article 18—a parliamentary approval with and subsequent ratification "by the necessary legislation."

The foregoing argument is amply confirmed and illustrated by the British statute, Ireland (Confirmation of Agreement) Act, 1925, and the Agreement dated 3rd December, 1925, which it embodies and confirms. It is an Act of parallel import and significance to the original British Act confirming the Anglo-Irish Treaty. Its title sets forth that the force of law was given to that Treaty by both legislatures—the titles of the respective British and Irish Free State Acts being expressly mentioned:—

"An Act to confirm and give effect to a certain Agreement amending and supplementing the Articles of Agreement for a Treaty between Great Britain and Ireland to which the force of law was given by the Irish Free State (Agreement) Act, 1922, and by the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922" (10th December, 1925),

and that it is not an "imposed statute of the Imperial Legislature" is seen in Sec. 2, Sub-sec. 2, which shows that the concurrent Irish Act is indispensable to the effectiveness of the Agreement:—

" . . . (2) This Act shall come into operation on the date on which the said Agreement is confirmed by Act of the Parliament of the Irish Free State, or if such an Act is passed before the passing of this Act shall come into operation on the passing of this Act."

(iii) *There could be no Treaty between a Sovereign and His Subjects*

This contention is closely linked with the preceding one. It has been argued that the Articles of Agreement for a Treaty must necessarily operate by virtue of the United Kingdom statute giving to the Treaty "the force of law" inasmuch as there was no "real" Treaty. A Treaty, so the argument goes, implies two sovereign bodies contracting with each other on equal terms and there was no such sovereign body in Ireland. This is a proposition supported by much erudition and historical lore on the topic of treaty-making.

But is the difficulty really so great when once the facts are established. Must not the theories be fitted to the facts rather than the facts negatived or distorted to fit the theories? It is not necessary to enter upon abstruse and difficult topics as to the divisibility of the Crown under the

Commonwealth Constitution. It is assumed that where a substantial sovereignty exists a sufficient element of the symbolical Royal Authority is implied to render it constitutionally operative.

The first and most outstanding fact is that Britain in 1921 offered a Treaty to Ireland, executed the Agreement for a Treaty with Ireland, ratified that Agreement with Ireland after due deliberation, and implemented and acted upon that Agreement for a Treaty. There is no faintest trace upon the record of the negotiations between the two high contracting parties up to the date of partial implementation of any doubt as to the contractual capacity of either of the two signatories. It is a necessary presumption of fact—not a mere presumption of courtesy—that in all this Britain was acting in good faith. With full knowledge she accepted the contractual competence of the Irish signatories and of the representative bodies that approved and ratified for Ireland. Profound alterations ensued in the respective positions of the two signatories. In what view of the law and practice governing contractual relations within, or between, civilised communities would it be permissible for Britain subsequently to allege a hidden defect in her own title to grant what she had offered, professed and purported to grant? Or to maintain that she had therefore, in fact, granted something quite different? It is surely not necessary to elaborate an argument as to the principles of estoppel—as to the binding character of the obligations of good faith.

Again—on the facts. The alleged impediment to the Treaty operating as a treaty rests upon the view (*a*) that, in British law, the Irish, being subjects, could not enter into a treaty with the Crown, and (*b*) that, therefore, the settlement depended upon the unilateral act of the British Parliament in giving to it “the force of law,” and that it was thus a settlement “imposed” by British law. The answer must be that, on the facts, the sovereign Act of State

ratified by the Legislature of the United Kingdom definitely silences all doubts as to its competence and effectively clothes the transaction with a validity fully binding on all British subjects and on British legal tribunals which had no power to restrain, review or rescind it. Nor would it be competent for these tribunals, incidentally to the discharge of their judicial functions, to construe the ratifying and implementary statutes in such fashion as to defeat the plain purport and intention of that Act of State—or, if they did so, it would be competent for the Legislature—and obligatory upon it at the instance of the other party to the Treaty—to pass additional legislation for the further assurance of the rights imperilled by the failure of its own tribunals to give due effect to its statutorily expressed will.

And yet again—on the facts. The peace negotiation of 1921 between Britain and Ireland was neither a negotiation between sovereign and subjects nor was it a negotiation between two separate sovereign states. That much was agreed by the two sides as a condition of the discussion—and that agreement forms part of the conventional basis upon which the Treaty rests. And the Treaty having been executed and ratified it was no longer open to either party to question the contractual competence of the other party to execute and ratify it. The method in which the technical difficulty was dealt with is perfectly clear. By agreement (Articles 17 and 18) the Irish spokesmen (in fact, the spokesmen on behalf of the militant Irish Republic) took on a representative capacity loosely related to the expiring British system in Ireland. That is, they made use of the electoral law of that system for the purpose of assuring an admittedly representative character to the parliamentary body which should stand for Ireland in approving the Treaty and later in ratifying it by the necessary legislation. The Irish Republic, accepting Dominion status, effected and completed the transaction by merging itself

into the new institutions—the transitional stage being an enthronement of the popular will in an elective representative body acting as a Provisional Parliament and Constituent Assembly. From the British standpoint its contract was effectively made with the Irish Constituent Assembly, which set up the new Irish Free State, without special reference to what had preceded it. And it maintains its Treaty with the Irish Free State as the successor of that body. If the Treaty were to disappear, therefore, both sides would be remitted to their original rights—Ireland would claim to be the Irish Republic and Britain could claim the restoration of the previously existing United Kingdom of Great Britain and Ireland as organised under the Government of Ireland Act, 1920. But, so long as the Treaty remains, it is not open to either side to dispute its manifest conventional basis for the purpose of distorting its provisions into something repugnant to their plain intention.

On the facts, then, as shown in the preceding paragraph, what is there in the legal or constitutional technique of treaty-making or agreement-making to negative the possibility of Britain having intended to make or to maintain a treaty or agreement with the militant Ireland that became the Irish Free State? It is difficult to supply the hypothetical reasoning underlying what appears to be an untenable proposition. Is it that sovereignty is required in both contracting parties? Ireland most assuredly claims—and is entitled to claim the admission by Britain—that the Irish Constituent Assembly, as a representative body, stood for a sovereignty in no way less than the sovereignty inherent in Dominion status. Are the legalists of Britain prepared to argue that although such sovereignty is now—since 1931—implied in Dominion status by virtue of the Statute of Westminster, there was no such sovereignty in 1921–22? If they do, they will have to answer how it came about that the Dominions were accepted as signatories of

the Treaty of Versailles in 1919. It is not necessary to refer back to preceding chapters to demonstrate that this essential quality of Dominion status dates back to 1917 and was put in evidence in 1921 for the purpose of inviting Ireland's acceptance of it. A clear precedent is available which appears to be conclusive on this point. It is contained in a British Act of Parliament—"The Nauru Island Agreement Act, 1920" (10 and 11 Geo. V. c. 27)—dated August 4th, 1920, that is, nearly a year and a half before the Anglo-Irish Treaty. Its longer title is:—

"An Act to confirm an Agreement made between His Majesty's Government in London, His Majesty's Government in the Commonwealth of Australia and His Majesty's Government in the Dominion of New Zealand in relation to the Island of Nauru."

The Act recites that an Agreement was made on the 2nd day of July, 1919, and that it is set out in the Schedule to the Act. The Act reads (Secs. 1 and 2):—

- "1 (i) The Agreement is hereby confirmed subject to the provisions of Article 22 of the Covenant of the League of Nations.
 (ii) Any sums payable under and by virtue of this Agreement by the Government of the United Kingdom shall be paid out of monies provided by Parliament.
 2 This Act may be cited as the Nauru Island Agreement Act, 1920.

The Agreement itself, which was executed by Mr. Lloyd George, Mr. W. M. Hughes and Mr. W. F. Massey, signing each in his representative capacity as Prime Minister of his own country, provides by Article 15 that "The Agreement shall come into force on its ratification by the Parliaments of the three countries." Here, then, before the Anglo-Irish Treaty and before the Imperial Conference of 1921,

was an agreement or treaty between the United Kingdom and two of the Dominions. It was a transaction between the executive governments concerned and it required ratification by each of the three parliaments controlling these executive governments before it should come into force. The British Act, in confirming or ratifying, gives the Agreement legal effect in the sphere of the municipal law of the United Kingdom so far as is requisite, by enacting how the payments of money to be made pursuant to it are to be provided.

Would the legalists contend that the Nauru Treaty was not "really" a treaty, because of "the legislative supremacy of the Imperial Parliament" and of the correspondingly subordinate positions of the Dominions that joined in it? And, whatever the Judicial Committee of the Privy Council might hold if the issue arose before it, would they ask the British Government of the day to take its stand upon their contention in the face of the world, either at Imperial Conferences or in the proceedings of the League of Nations?

In the light of these considerations and of the precedents of the Versailles and Nauru treaties, what is left of the legalistic contention that the Anglo-Irish Treaty was not, and could not be, a "real" treaty? Are there some esoteric mysteries in the technique of treaty-making—or perhaps, indeed, in the essential quality of Anglo-Irish relations—which, though operating as a bar, are yet not susceptible of reasoned exposition in the open?

It is appropriate to conclude this argument from an independent Irish standpoint by confirmatory quotation from the British academic authority whose philosophic detachment renders him immune from partisan bias. Professor Berriedale Keith in 1934 wrote as follows:—

"The answer to the question of the validity of the Articles of Agreement for a Treaty between Great Britain and Ireland of December 6th, 1921, is simple. It was concluded under the authority of the Crown by a British

delegation with an Irish delegation, and it provided for its own submission for approval to the legislatures which controlled the executive governments by which it was concluded. These legislatures gave the force of law to the articles of agreement. From the British point of view, the exercise of the royal prerogative followed by Parliamentary sanction gives absolute validity to the transaction. From the Irish point of view, the action of the delegates of the revolutionary government and of the revolutionary legislature was clearly within the powers of these bodies as representing the majority of the people in the Irish Free State territory. . . .

"It cannot be denied that the Treaty which resulted from the ratification of the articles was in itself an international instrument. It is true that the British government definitely refused prior to the conclusion of the treaty to regard the revolutionary government as the government of an independent state, but it must be conceded that, when it was finally agreed to conclude the articles, the British government by their form did recognise (whether intentionally or not) the independence of the other contracting party. This conclusion is confirmed by comparison of the great care taken in the pacification of Vereeniging of 1902 to negative recognition, even for the purpose of concluding that agreement, of the Boer republics which had been annexed by the Crown, But the recognition involved was essentially temporary, for the aim of the treaty was to incorporate Ireland in the British Empire with Dominion status. The British Government, it is right to say, has never admitted that the conclusion of the articles involved even temporarily and conditionally the recognition of Irish independence" (Professor Berriedale Keith on *Certain Legal and Constitutional Aspects of the Anglo-Irish Dispute*, pp. 7 and 8).

(e) *Was Ireland's Dominion Status Cut Short in 1921?*

A different issue raised by the British case is the claim that the Treaty settlement conferred upon Ireland a Dominion status which was not the Dominion status of

to-day. Once again the difficulty is met that the details—even the main lines—of the argument in support of the proposition are withheld. There, is, however, no doubt whatever that the claim has been made and that it furnishes the impelling political motive which underlies the present Anglo-Irish quarrel and the resultant economic war. The words of Sir Thomas Inskip, quoted above in pp. 141-2 and the pronouncements of Mr. J. H. Thomas, as Secretary of State for the Dominions, and of Lord Hailsham, are conclusive of the fact that the claim has been made. It is sufficient to make one quotation from the latter. Speaking in the House of Lords, Lord Hailsham quoted the so-called Balfour Declaration of 1926 as showing the position of the members of the Commonwealth in relation to one another and proceeded:—

“And that statement defines the general position in the case of the Irish Free State as of other members of the British Commonwealth, but of course in the case of the Irish Free State it is conditioned by the terms of the Treaty under which the Irish Free State was granted the status which it enjoys . . .” (Hansard, 23rd July, 1934).

Now the examination of this claim involves two questions. It is necessary to ascertain at what point in the proceedings this differentiation between Ireland's Dominion status and the Dominion status of the other members of “the Community of Nations” begins:—

- (i) Does it begin with something to be found in the terms of the Treaty itself?
- (ii) Or does it begin with something in the method or in the terms of its implementation?

In regard to both questions it must be premised that the answer, upon the broadest grounds, is that if the Treaty provided, as it does by Article I, that “Ireland *shall have*

the same constitutional status" as Canada, Australia, etc., without any subsequent qualification, then no differentiation of that status to Ireland's detriment can exist unless it has been provided by a contractual instrument of equivalent authority binding both signatories of the original agreement, or unless it rests upon a manifest and unconstrained assent by Ireland—and that no such instrument or assent exists. *Prima facie*, therefore, if Britain alleges that the status of the Irish Free State is now different from that of the other Dominions she appears to be seeking to derogate from her own grant in plain violation of the Treaty.

As to question (i), possibly the suggestion is that Ireland only got what the Dominions had in 1921. An attempted distinction of this sort ignores the significance and purport of the word "status." "Status" implies a position with inherent rights. It relates not merely to specific arrangements or things actually existing but to rights and liabilities projecting into the future as surely as they are founded on the past. The nature of the arrangements or things actually existing and of the rights and liabilities projecting into the future, which Ireland in 1921 was to have, was expressly measurable by what the other Dominions and, in particular, Canada were entitled to in 1921. The Irish Free State became, in 1921, one of a class with declared and admitted constitutional rights which, authoritatively adumbrated in their origin at an earlier date, had not yet been fully expressed in practical operation. Without her consent she could not be deprived of any portion of those constitutional rights as and when they became fruitful of benefit for that class; and any attempt so to deprive her or to exclude her from that class would be a violation of the Treaty. There was no reservation as to the future in the Treaty which in its express terms looked to the future and was providing for the future regulation of Anglo-Irish relations.

The argument may conveniently be illustrated by a parallel. Supposing A by the purchase of Government

stock acquires the status of a Government stockholder—what would be thought if it were sought to refuse payment of subsequent dividends to him or to deny him rights on redemption, conversion, etc., which the other stockholders enjoyed? How, without the express concurrence of A, could such a differentiation between him and others of the same status be justified?

A further point, on the facts, to be mentioned is that when Dail Eireann in Dublin was debating the question of approving the Treaty, Mr. Arthur Griffith, the Chairman of the Irish Delegation that had signed it, read a letter dated 12th December, 1921, from the Prime Minister of the United Kingdom. Mr. Griffith had been "requested to get from Mr. Lloyd George a definite statement covering points in the Treaty," etc., for the purposes of the debate and of the decisions to be arrived at. Mr. Lloyd George's letter definitely states that there are no special arrangements in the Treaty which in any way affect status—an assurance which the letter elaborates—and it goes on:—

"It is our desire that Ireland shall rank as co-equal with the other nations of the Commonwealth, and we are ready to support her claim to a similar place in the League of Nations as soon as her new Constitution comes into effect."

This letter appears to afford conclusive proof that the intention of the British Delegation was not other than that which was clearly expressed by the Treaty itself. Co-equality with the other Dominions was the touchstone. There were no reservations.

The answer to question (i) therefore is that there was nothing in the terms of the Treaty itself nor in the circumstances attendant upon its negotiation, to warrant a claim that the Dominion status of the Irish Free State could properly be differentiated from the Dominion status of the other Dominions.

Sir Thomas Inskip, however, would apparently answer otherwise, if his speech in the House of Commons in the debate on the Statute of Westminster quoted above (p. 141) correctly defines his views. He does not advert to the significance of the term "status" as used in the Treaty. And, even more singularly, he appears to have represented to the House that the Balfour Declaration of the Imperial Conference of 1926 was the beginning of a new constitutional order. He speaks of the Balfour Declaration as "granting not independence but autonomy to our self-governing Dominions" whereas it did not, and did not purport to do, anything of the kind. The relevant quotations from the Report of the Imperial Conference of 1926, which includes the Balfour Declaration, are given on pages 114-5 above. They make it abundantly manifest that the Balfour Declaration confined itself to elucidating and defining the then existing position of "the group of self-governing communities composed of Great Britain and the Dominions," which "from a strictly constitutional point of view, has now, as regards all vital matters, reached its full development." It also declared: "Every self-governing member of the Empire is now master of its own destiny. In fact, if not always in form, it is subject to no compulsion whatever." The Balfour Declaration, thus, *granted* nothing to any Dominion. It was a declaration made, not by Lord Balfour, who was merely the distinguished draftsman of salient passages, but by the accredited representatives of that "group of self-governing communities composed of Great Britain and the Dominions" to which reference is made and which included both the signatories of the Anglo-Irish Treaty. And it was a declaration—duly adopted subsequently by the several signatory nations—intended to make clear the then existing constitutional relations *inter se* between the signatories. It is, therefore, in the Irish view an agreed definition of the Dominion status which Ireland accepted under the Treaty.

How precisely the Irish Free State was supposed to be excluded from the benefit of the alleged "grant" by the Balfour Declaration Sir Thomas Inskip omitted to show. But apparently its exclusion was due to some defect in its title under the Treaty that warranted his differentiation of Irish Dominion status from the Dominion status of the other Dominions which are supposed to have benefited by the "grant." In passing it is necessary to observe that it is extremely difficult to conjecture what the argumentative position indicated by Sir Thomas Inskip can be. It appears to involve numerous insurmountable contradictions. But it is at least clear that in his view the other Dominions, with Canada by name included, got something in 1926 that was denied to the Irish Free State.

Sir Thomas Inskip's legalistic thesis—which was apparently the basis of the policy of the National Government of the day—may profitably be contrasted with the speech of Mr. L. S. Amery in the same debate. Mr. Amery participated in the Imperial Conference of 1926 as Secretary of State for Dominion Affairs and had a long official and unofficial experience of both Colonial and Dominion affairs. The following quotation includes a description of his political orientation, and it expresses his views of practical and constructive statesmanship as against the legalistic thesis of which he was aware:—

" . . . I am an old Unionist. I am one of those who were prepared in 1913-14, if necessary, to resort to armed force to prevent Ulster being coerced within a Home Rule Ireland. I am one of those who afterwards supported forcible suppression of the Irish Rebellion. I should not have put my hand to that Treaty. I was for maintaining the Union by force. I still regret what took place. I do not say now that I am altogether sanguine—as to what might happen in the future. I do know that when I became Secretary of State for Dominion Affairs, once we had set Ireland upon the footing of a Dominion, there was

only one way to treat it, and that was like the other Dominions, and in everything I had to do, whether as First Lord of the Admiralty or as Secretary for Dominion Affairs, I extended to my colleagues from the Free State the same complete confidence and the same loyalty and wholehearted welcome that I extended to any other statesman of any other Dominion. If you give you must give generously and without looking back.

I am not so optimistic as to believe that all Irish troubles, that all difficulties between this country and the Irish Free State are ended for ever, but I do say that, having set the Free State upon the footing of a Dominion you must treat it as a Dominion. The main basis, the first Clause of the Treaty of Agreement, was that the status of Ireland was that of Canada and the other Dominions. I do not know what lawyers may say as to what that meant, whether they say that it meant the status of Canada as at the date, 1921, and that Irish nationhood was, as it were, put into cold storage at the 1921 temperature. It cannot be done in practice. You must agree that Ireland as a Dominion should develop with the other Dominions and share the same position with them. This does not affect the validity of the Treaty or its binding moral force upon both sides by one whit. Nor does it strengthen our position if it comes to any issue which affects us in time of war. If Ireland in time of war were minded not to fulfil its obligations it is not to the law courts that we should go!"

Lord Hugh Cecil: "It is a matter of whether what we do is legal or illegal."

Mr. Amery: "I say that there are other issues which far transcend the legal issues in importance, and that when you are dealing with a nation which you have resolved to treat as a nation, you cannot control it by niggling points of law or by Amendments to any Act. Do not let us forget the fact that if there is equality it must be on both sides, and that we in this House have complete power, as far as law goes, to break the Irish Treaty. No one has ever suggested that we should not be free to alter any law which has ever been passed in

this Parliament. But does anybody suggest that our maintenance of this agreement is really weakened by our legal power to go back upon it? We may have our misgivings and our doubts as to the actions of certain parties in Ireland, but I cannot see how, on the basis on which we have been acting ever since the Treaty, we can insist by law on obligations being imposed on one party and not on both."

Mr. Amery's speech preceded that of Sir Thomas Inskip; and the former, when speaking, was consequently unaware that the proposition that "Irish nationhood was, as it were, put into cold storage at the 1921 temperature," although insisted upon as representing the Government view, was to be left bare of all argumentative demonstration.

These two quotations indicate the two conflicting lines of thought which have governed British policy in its relations with the Irish Free State for the last fifteen years, sometimes severally and sometimes jointly.

As to question (ii), the answer must be sought in the terms of the respective Acts by which the two countries ratified the Treaty. The relevant passage is contained in the Irish Constituent Act and is recited and adopted in the subsequent United Kingdom Act. It expressly subordinates the Constitution to the terms of the Treaty and makes full implementation of the Treaty both permissive and, in some aspects, compulsory, by amending legislation as and when required. And the Constitution itself confers full powers of constitutional amendment on the Oireachtas subject only to (a) the time limit which was subsequently extended, and (b) the conditions that the amendments should accord with the Treaty. The enacting words which make the Treaty the dominant instrument are:—

"The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between

Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as the Scheduled Treaty) which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty." (See Appendix pp. 309-11.)

It is doubtless true that this provision was introduced as the result of an informal negotiation, prior to ratification, between the two countries; and that it was for the reassurance of the British representatives that it was introduced. But that does not alter its bilateral effect. The original Draft Constitution was based upon the full implications of Dominion status as to national sovereignty. To this the British representatives demurred and insisted that the precedents of existing Dominion Constitutions should be followed. As Dominion status had not yet been "set down in black and white," a compromise reasonably ensued. Some of the precedents, as to the Crown, the Oath, the power of reservation, the appeal by special leave to the Privy Council and so on were grafted on to the draft and the provision agreed upon by which the Treaty itself became the test. That test operates bilaterally—in favour of either contention.

It is thus clear that the Constitution did not, in any way, cut down the quantum of Dominion status as assured by the Treaty nor restrict the right of Ireland to benefit by it in full. Indeed the circumstances of its ratification point convincingly to the conclusion that, at that time, it was not the view of either country that the Treaty limited Ireland's Dominion status to what the Dominions or

Canada had in law at that date. The Constitution, in the form in which it was ratified, was accepted, as has been seen, by British representative statesmen and lawyers. True, if specific doubts should arise, the Treaty was to be the test—but it was accepted as being fully in accordance with the Treaty. Now the text of the two instruments was in the hands of all the legislators and lawyers of both countries and was subjected to close and skilled scrutiny. Is it not clear that the only doubt that remained was not in regard to the specific provisions of the Constitution but in regard to the exact range and quality of the inchoate rights of Dominion status? Is it not clear also that the effect of the whole transaction was that the Constitution—and the power of the Oireachtas to amend it in future—were to be limited solely by reference to the detailed definitions of Dominion status as and when they should come to be “set down in black and white”? How, for example, could it be possible for any tribunal, without an arbitrary violation of its judicial obligations, to overrule the precise enacting words of Article 12 of the Constitution which create legislative sovereignty, on the ground that they were inconsistent with the Treaty which, in the view of the tribunal, required a subordinate legislature? It would surely be a *reductio ad absurdum* to argue that any tribunal was given the power to re-write the Constitution in order to make it conformable to a version of the Treaty repugnant to the agreed version underlying the agreed enactments of the two Legislatures.

There is a last possible contention to be considered. It is admitted that it is based on a speculation as to whether it exists in the background: but, as formulated, it appears to be not inconsistent with some of the reasoning underlying the legalistic thesis.

Will it be argued that the Treaty settlement (i.e., the Treaty and the Constitution) having been effected, or “imposed by the legislation of the Imperial Parliament,” the contractual obligations (under the Treaty) of Britain

were finally fulfilled and that Ireland's acceptance of it bound her and would continue to bind her by virtue of the Treaty until by bilateral agreement the Treaty were changed—and that the United Kingdom statutes must be construed as statute law and not as part of an agreement *inter pares* with implications arising from considerations of the principles of contract as to attendant circumstances, obvious intention, *uberrima fides*, the scope and purport of the transaction and the like? And—most difficult of all—where subsequent legislation of the Imperial Parliament gives Ireland by express words the legal power to “abrogate” any of its statutes Ireland is precluded, by the honourable obligations arising under the Treaty and from her acceptance of the “imposed” legislation of 1921-2 as a true fulfilment of the Treaty, from exercising the express powers granted to her in 1931? In this view the Treaty settlement of 1922, as interpreted from time to time by the Privy Council, would represent the full expression of Ireland's Dominion status without benefit from any further “setting down in black and white” and without potentialities of growth. In this view, too, the Treaty, existing solely by virtue of two Imperial statutes crystallising a version of its terms much restricted by judicial interpretation with the judicial interpreters installed in perpetuity, is continued in existence for the purpose, or with the effect, of rendering the statutorily imposed settlement irrevocable even when a further Imperial statute is enacted giving Ireland express powers of amendment or revocation.

Of such a contention if it be propounded—or if its existence is necessarily to be inferred from the propositions laid down in certain responsible and representative utterances—it is sufficient to say that it appears to carry the acrobatics of legalistic dialectic to the point of contortionism. It appears to be wholly out of accord with the facts of the case, with the law, whether municipal, international or constitutional, with the principles of

contract, with ordinary good faith and with plain common sense. The matter contained in the preceding pages furnishes the warrant for so regarding it. Possibly, however, it will never emerge into the open daylight.

(f) *The Appeal to the Privy Council*

(i) *Its Origin due to the Compromise*

It is easy to understand the claim on the part of Britain in 1922 that the appeal to the Privy Council should be included in the Constitution. British statesmen were not prepared, at the moment, to accept a Constitution drafted on lines, if it may be so termed, of one hundred per cent Dominionism. To have done so might have prejudiced the discussions of Dominionism yet to be held and which were not held until the Imperial Conference of 1926.

On the other hand Ireland regarded juridical independence as the correlative of legislative independence. The two combined represented her historic claim which had been solemnly conceded by British statute in 1783 at the time of the recognition of the independence of the North American Colonies. This old Act ran:—

“That the said right claimed by the people of Ireland to be bound only by laws enacted by His Majesty and the parliament of that Kingdom in all cases whatever, and to have all actions and suits at law or in equity, which may be initiated in that kingdom, decided in His Majesty’s Courts therein finally, and without appeal from thence, shall be, and it is hereby declared to be established and ascertained for ever, and shall, at no time hereafter, be questioned or questionable,” (23 Geo. III cap 28).

She was entitled now, under the Treaty, to no less, as a matter of constitutional right. And she wished now to give legal form and operation to that constitutional right to

juridical independence just as she was giving legal form and operation to the constitutional right of legislative sovereignty. In her view any Dominion, and in particular Canada, could get rid of the Privy Council appeal if it wished to—and Ireland wished to be rid of it. The British view insisted upon the Canadian precedent; and, as has been seen, a compromise ensued. This compromise was a temporary and provisional arrangement, as the method of effecting it proves, for the full virtue of the Treaty was expressly preserved. Ireland obtained her legislative independence—legally established and agreed—but conceded, for the time being, a limited right of appeal to the Privy Council.

On the limited character of the Privy Council Appeal, as indeed upon the proposition that its limitation, and therefore presumably its very existence, was properly a matter resting with the legislature of the Dominion concerned, a passage from the speech of Sir John Simon on Second Reading in the House of Commons of the Irish Free State Constitution Bill throws valuable light from the standpoint of British law and statesmanship:—

“I take the third example, the question of appeals to the Privy Council, a rather technical subject really, but the hon. and gallant gentleman, I think, was not justified in his criticism. The truth is that both in Australia and in South Africa there have been restrictions put upon appeals to our Privy Council here, which are at least as strict as the restriction which is to be found in this Constitution. This Constitution preserves the right to appeal to the Privy Council by what is called special leave. It gets rid of the right of appeal without special leave. That is exactly the situation of the Union of South Africa to-day, with this additional provision, that in the case of the Union of South Africa the Parliament of South Africa has reserved the power at any time by further legislation of its own to cut down the subjects on which even special leave may be given.”

And further on:—

“ . . . for the most striking feature of this Constitution is that it completely confers upon Ireland the status of a British Dominion,” (Hansard, 27th November, 1922. Cols 344-49).

Further, as to the limited character of the Privy Council Appeal in the Constitution it appears that “undertakings were given to Irish Ministers when the draft Constitution was under consideration,” as will be seen further on, and that a subsequent departure from those undertakings gave rise to prolonged controversy.

The Irish Free State, having accepted the compromise, pursued its claim to full juridical independence in the proceedings of ensuing Imperial Conferences. It cannot be denied that she did so. It surely cannot be denied that it was the appropriate method of seeking the full implementation of the constitutional right to which the Treaty entitled her. And it is beyond all possibility of denial that Britain participated in, and is fully bound by, the results of those proceedings as embodied in unanimous Resolutions. In this way it stands on the record of the Imperial Conference of 1926 that Britain yielded the point in principle. Thereupon Ireland might quite reasonably have insisted forthwith on amending her Constitution by eliminating the Privy Council appeal. But she held her hand. She accepted the view of the Conference—which she was in no way bound to do—that the resultant changes should be deferred in view of the possibility of attaining a uniform system applicable generally throughout the Commonwealth. The following is the relevant passage from the Report:—

“(e) The Appeal to the Judicial Committee of the Privy Council.

“Another matter which we discussed, in which a general constitutional principle was raised, concerned

the conditions governing appeals from judgments in the Dominions to the Judicial Committee of the Privy Council. From these discussions it became clear that it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected. It was, however, generally recognised that, where changes in the existing system were proposed which, while primarily affecting one part, raised issues in which other parts were also concerned, such changes ought only to be carried out after consultation and discussion.

"So far as the work of the Committee was concerned, this general understanding expressed all that was required. The question of some immediate change in the present conditions governing appeals from the Irish Free State was not pressed in relation to the present Conference, though it was made clear that the right was reserved to bring up the matter again at the next Imperial Conference for discussion in relation to the facts of this particular case."

Here, then, in 1926 was the abandonment from the British side of the Privy Council Appeal as an essential element of Dominionism. It was seen to be inconsistent with co-equality. Discussion thereafter related to the topic of a substituted Commonwealth tribunal, its structure and functions, if it should come to be established.

The following Imperial Conference, that is, the "expert" Conference of 1929, reported:—

"We felt that our work would not be complete unless we gave some consideration to the question of the establishment of a tribunal as a means of determining differences and disputes between members of the British Commonwealth. We were impressed with the advantages that might accrue from the establishment of such a tribunal. It was clearly impossible in the time at our disposal to do more than collate various suggestions with regard first to the constitution of such a tribunal, and

secondly, to the jurisdiction which it might exercise. With regard to the former, the prevailing view was that any such tribunal should take the form of an *ad hoc* body selected from standing panels nominated by the several members of the British Commonwealth. With regard to the latter, there was general agreement that the jurisdiction should be limited to justiciable issues arising between governments. We recommend that the whole subject should be further examined by all the governments."

This Report, adopted by the Imperial Conference, 1930, signalises the death, by unanimous consent, of the Privy Council Appeal as an essential feature of Dominion status. The Conference of 1930, "in the absence of general consent to an obligatory system" (of *ad hoc* arbitration) decided to recommend the adoption of a voluntary system. The ensuing Statute of Westminster, 1931, based on the agreements embodied in the Imperial Conference Report, set free the Dominions by their own legislation to give legal effect to their constitutional rights as now further defined. Thus they became free legally to abolish the Privy Council Appeal. Canada has done so in part. The Irish Free State has done so in full.

The action of Canada passed unchallenged. The action of the Irish Free State has been stigmatised as a violation of the honourable obligations of the Treaty. It appears that the Treaty which gave Ireland Dominion status and, in particular, the status of Canada, can be made honourably to deprive Ireland of a right declared to be inherent in Dominion status and which Canada herself has formally exercised without question.

(ii) *The Privy Council Appeal and Dominion Status.*

Dominion status dates effectively from 1917. Discussion as to the Privy Council Appeal as an incident of Commonwealth or Imperial organisation conformable with Dominion

status dates from 1918. In the latter year, Mr. W. M. Hughes, Prime Minister of Australia, advocated the creation of a single final Appellate Tribunal for the whole British Empire as a step in the direction of Imperial organisation, and "the alternative to this is, plainly, to allow the Privy Council's functions to atrophy," (Imperial Conference Report, 1918, p. 152). He based his proposal upon a vigorously phrased contention that the Privy Council Appeal was unsatisfactory and failed to secure the confidence of the Dominions. It was a relic, he said, of Colonial days, and it did not rank as the equal of the House of Lords as an Appellate Tribunal. The appeal was a badge of subordination. It did not even tend to produce uniformity throughout the legal systems of the Commonwealth. Its decisions were not regarded as binding by the English Courts¹ and whilst binding in Dominion Courts they were possibly not consistent with the law laid down by the House of Lords. The discussion proceeded on the basis that it was fully within the competence of the Conference to create such a new system if it pleased and that it lay with each Dominion individually to do what it liked in the way of limiting appeals under the existing system. Thus Sir Robert Borden, Prime Minister of Canada, said:—

"I think the tendency in our country will be to restrict appeals rather than to increase them."

And Mr. N. W. Rowell, K.C., President of the Privy Council in Canada, said:—

"Any dissatisfaction expressed in Canada was that we did not further limit appeals to the Privy Council."

And Mr. Burton, South Africa, expressed agreement with Sir Robert Borden. In the result, a colourless resolution was passed deferring the project for further consideration.

¹ The Lord Chancellor assented to this proposition.

It has already been seen how the project has, in the proceedings of subsequent Imperial Conferences, faded away into a recommendation of a system of non-compulsory arbitration of an *ad hoc* character as occasion might arise. It has also been seen that at the Imperial Conference of 1926 Britain waived any claim that the Privy Council Appeal should be binding on any Dominion that did not want it.

It would appear to follow from the foregoing that the Irish Constituent Assembly of 1922 had good ground for holding that the Privy Council Appeal was not a necessary incident of Dominion status inasmuch as it was inconsistent with Dominion sovereignty in the constitutional sense and was, in effect, terminable at will.

(iii) *How the Compromise as to the Privy Council Appeal has Worked Out.*

Now the Privy Council Appeal, as introduced by a compromise into the Irish Constitution, was limited in scope. (Article 66 of the Constitution may be read in the Appendix.) It was limited by the enacting words which brought it into being, and it was limited by the established practice of the tribunal itself as it existed at the date of the Treaty. Therefore the limited Privy Council Appeal inserted in the Irish Constitution could not properly be changed by unilateral British action into a more extensive appeal without Ireland's consent. It must clearly be conceded that the British Government and Legislature were bound, either by the obligations of the Treaty or by constitutional principles or by both, to abstain from so changing it. But what if the Judicial Committee of the Privy Council itself should give an unduly wide interpretation to its powers so that the Irish Free State would be subjected to something obviously outside the purview of the compromise arrangement? What then?

The answer must surely be that the prime consideration is the maintenance of the basis of what—still alternatively—was the Treaty settlement or a constitutional right. If, therefore, a judicial body with ultimate appellate jurisdiction, oversteps the limits of its functions, whether prescribed by statute or established usage, the appropriate remedy lies in further legislation. Neither party should seek to profit by the error. Each should co-operate towards the maintenance and, if necessary, the restoration of the *status quo ante* the judicial exuberance.

Now it has been seen, on the high authority of Sir John Simon, that the Privy Council Appeal in the Irish Constitution was the same as that in the South African Constitution of 1909—the most recent of the statutory Dominion constitutions. And the scope and nature of the South African appeal had then recently been determined by the Judicial Committee itself. It was a much restricted appeal and the Judicial Committee was to give effect to the intention or point of view of the South African Legislature. This is clear from the report of the case. The Court consisted of Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Atkinson and Duff, J. The date was 8th July, 1920.

Headnote. "Since the passing of the South Africa Act, 1909, Sec. 106, leave to appeal from the Supreme Court of South Africa should not be given in cases which raise questions of a purely local character, such as the definitions of boundaries of a borough, but only in cases which raise serious constitutional questions.

"Leave to appeal . . . refused.

"The effect of the Confederation was to say that South Africa is to dispose of its own appeals. One cannot read Sec. 106 of the South Africa Act, 1909 (9 Ed. VII c. 9) without seeing that the intention was to get rid of appeals to the King in Council except such as in the strict exercise of the prerogative His Majesty the King should say that he would allow on some important ground. Even then Parliament has power to limit these

appeals from South Africa. No doubt the prerogative is not wholly swept away, but it is obviously intended that it should be exercised in a very much restricted sense. As His Majesty has assented to this Imperial Act, we must bear that in view. In the case of Canada it has been held that the words of the Act did not touch the discretion, but in the South Africa Act of 1909 there is express power given to limit the prerogative. That shews an intention that the matter should be looked at from a South African point of view." (*Whittaker v. the Durban Corporation*, 90 L. J.P.C. 119).

When, therefore, the first petitions for leave to appeal from the Irish Free State came before the Judicial Committee on 25th July, 1923, the tribunal expressly referred to this case in laying down the principles upon which the Privy Council would deal with Irish Free State Appeals. The judges were Viscount Haldane, Lord Buckmaster and Lord Parmoor. It is worth noting as being perhaps significant that much stress was laid upon the detachment of the tribunal from "politics, policies or party considerations."

Lord Haldane said:—

"Before entering on the consideration of the appeal it would be as well to examine on what principle their Lordships should proceed. They were Privy Councillors acting in the capacity of Judges, and in giving advice to His Majesty in a judicial spirit they had nothing whatever to do with politics, policies or party considerations. What they did was to furnish the Sovereign with a report on what was proper to be done in certain instances on the principles of justice. The Judicial Committee sat as Privy Councillors and they might be learned judges from Canada or India, or Chief Justices from the other Dominions. The Sovereign, as Sovereign of the Empire, still retained the prerogative of justice by Imperial Statute. The growth of the Empire and particularly of the Dominions had led the Board to restrict substantially the exercise by the sovereign of that prerogative. With

regard to the position of Ireland, their Lordships would look at the subject matter of appeals from the point of view of the Dominions. In any petition for leave to appeal which did not involve some great principle or some principle of wide public interest they would not give leave. What he desired to point out was that they would look somewhat critically at these petitions. The Irish Free State, by virtue of the Treaty, was now in the position of a Dominion."

Lord Buckmaster: "As far as possible, finality is to be given to the Irish Courts, but there is the right of supplication to the King in any matter involving serious considerations."

"Lord Haldane said that the meaning of the unwritten constitution applied to the Dominion of the Irish Free State as it did to other Free States."

(*Hull v. McKenna*, *The Times*, 26th July, 1923,
p. 4, Col. 5.)

The above and three other petitions were dismissed with costs. The title of the case is *Hull v. McKenna*. It does not appear to be reported in the principal British law reports and in particular the Appeal Cases series of the Law Reports published by the Incorporated Council of Law Reporting—of which Council the Attorney-General and the Solicitor-General of the day were, *ex officio*, members. It is, however, briefly mentioned in Digests and Summaries. A report appeared in the Irish Reports three years later where the reference is (1926 I.R. 402).

Such then was the restricted nature of the Appeal to the Privy Council which was introduced into Article 66 of the Irish Constitution as a compromise between the signatories of the Treaty. Such it was according to the considered judgment of the Judicial Committee of the Privy Council itself within a few short months of the Constitution coming into being.

What was the sequel? The Privy Council changed its practice without statutory warrant from either country.

The facts are stated with perfect accuracy by a British jurist in connection with General Smuts' criticism of that tribunal in regard to a South African case in 1934—a British jurist who long advocated the retention of the Privy Council Appeal, as an organ of the Commonwealth structure.

"Unfortunately the Judicial Committee has never acted upon the view, more than once enunciated on its behalf by Lord Haldane, that its essential function is deciding constitutional issues, where the Dominions are concerned. In the case of the Irish Free State, the bitter contest between the Committee and the Government of the State was initiated by the former granting leave to appeal on what was merely the issue of the correct interpretation of the Irish Free State Land Act, 1923, an action declared by Mr. Kevin O'Higgins to be a very clear and definite departure from the undertakings given to Irish ministers when the draft constitution was under consideration, while recently the dangerous question of the validity of Irish legislation abrogating the appeal has been raised, not on an important constitutional issue, but on a purely technical and very obscure point of statutory interpretation as to fishery rights on the Erne.

"It may be hoped that the Union Government will not feel it necessary to follow the example of the Free State and abolish the appeal outright. It would suffice to limit it by Union Act, as full power to do exists, to cases involving the interpretation of the Union Constitution. But the danger is that, if the Union once starts legislation, it may be impossible to avoid abolition *in toto*."

(*"Letters on Imperial Relations, Indian Reform, Constitutional and International Law, 1916-1935,"* Berriedale Keith, p. 354.)

It is unnecessary to enlarge on the details of the controversy. It is sufficient to establish the fact that the scope of the appeal was enlarged from what it had been authoritatively declared to be just before the Treaty and Constitution

—and those authoritative declarations were *ex cathedra* pronouncements of the Judicial Committee of the Privy Council itself. Thus the basis—an important part of the basis—of the Treaty was altered by the Judicial Committee without reference to the authority of the high contracting parties and without constitutional or statutory warrant for an extension of the effective sphere of its jurisdiction.

What followed is of signal importance in the development of the controversy. In certain cases the Oireachtas, holding that its will had been defeated by an ultimate tribunal acting in excess of its jurisdiction, gave effect by special legislation to the decisions of the Supreme Court of the Irish Free State, and in effect annulled the decisions of the Judicial Committee. And in one important case (*Wigg & Cochrane v. The Attorney-General of the Irish Free State*) where the decision of the Judicial Committee was held by both the Irish and British Governments to defeat the intention of the Treaty it was at first proposed that the two Governments should introduce concurrent legislation to give effect to that intention. Instead of this, however, steps were taken which resulted in a reconsideration of the case by the Judicial Committee. At this reconsideration, the Judicial Committee felt itself justified, by a readjustment of the reasoning and estimations of value which it had previously adopted, in arriving at the same conclusion as before. Thereupon the two Governments in consultation arrived at an agreement to re-establish the arrangement prescribed by the Treaty. The Irish Government was relieved by the British Government of the unexpected burden thrown upon it in respect of excessive remuneration adjudged payable to ex-British civil servants. The British House of Commons voted the necessary moneys for the purpose without opposition, although the significance of the transaction did not escape notice. Thus the ex-Solicitor-General, Sir Henry Slessor, later Lord Justice Slessor, speaking for the Opposition said:—

"While we, of course, offer no objection to this grant, I think before we pass from this Estimate we must necessarily reflect on the extraordinary history which has produced it. I do not pretend to understand the matter very fully or very completely, but, as I understand it, the Privy Council in this matter appear to have advised on a different basis on two occasions, although they arrived at a similar conclusion. In the circumstances, perhaps, the second advice was better than the first. We are not here to discuss so much the merits or demerits of the Privy Council's advice, but certainly it is disquieting that judicial opinion should be so unstable. In the circumstances we can offer no objection to the Vote, but we can express the hope that in future the Privy Council will be of one mind and not of two minds."

And a final Agreement for "interpreting and supplementing Article 10" of the Treaty was executed on behalf of the two Governments to keep matters right in future. The procedure adopted, it is to be noted in passing, followed the precedent of the original Treaty. The Agreement, signed by Ministers on behalf of the two Governments, contained this Article:—

" . . . His Majesty's Government in the United Kingdom and His Majesty's Government in the Irish Free State have entered into the Agreement set forth in the Schedule to this Act being an agreement for interpreting and supplementing Article 10 of the Articles of Agreement for a Treaty between Great Britain and Ireland. . . . His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland and His Majesty's Government in the Irish Free State respectively shall as soon as possible introduce into their respective Parliaments such legislation as may be necessary to give statutory effect to this Agreement and this Agreement shall not take effect until such legislation in such Parliaments shall have been passed into law" (20 Geo. V. cap. 4—Passed 26th July, 1929).

Thus the agreement in the international sphere was to be made operative in the municipal law of each country by its own confirmatory legislation.

The significance of these episodes lies in the fact that the Irish and British Governments were united in their view that the intention of the Treaty was to prevail—even against the view of the Privy Council exercising ultimate appellate functions. Where the Treaty was frustrated by the interpretation placed upon it by the Privy Council its effectiveness was restored by a further Act of State ratified by both countries by legislation designed to make its terms more clearly binding in the domain of the municipal law of the signatory countries respectively.

The State maintained its superiority over the judiciary. The Judicial Committee was no “Oriental *cadi* administering justice under a palm tree” in virtue of an unbridled prerogative but a law-bound tribunal subject to the control of the legislatures which created the laws entrusted to it for interpretation.

The State—or more precisely the two States, each within the sphere of its own municipal law—exercised its sovereign authority to make matters right whether jurisdiction was exceeded or unforeseeable interpretations were adopted.

(iv) *The End of the Privy Council Appeal.*

Moore v. The Attorney-General of the Irish Free State.

The Privy Council Appeal was abolished in 1933 by the Oireachtas of the Irish Free State. The abolition was effective inasmuch as in 1935 it was recognised as valid by the Judicial Committee of the Privy Council. It was also recognised as effective by Mr. J. H. Thomas, Secretary of State for the Dominions. But whilst it was thus recognised as effective, it was stigmatised as an infraction of the Treaty. It was described by both as an exercise of a

legal right but as inconsistent with contractual or "moral" obligations. And it thus furnished one of the material causes for the further prosecution of the Anglo-Irish "economic war."

The Lord Chancellor's judgment in the case of *Moore v. The Attorney-General of the Irish Free State* (1935 App. Cas:) made his adoption of the full legalistic doctrine sufficiently clear. It is to be noted that there had been no representative of the views of either the Irish Free State Government or the United Kingdom Government during the hearing. The Attorney-General of England addressed the tribunal as *amicus curiae* but was careful to emphasise the fact.

"Nothing which he said," concluded the Attorney-General, "was said as representing the views of His Majesty's Government" (*The Times*, 12th April, 1934, p. 4).

The following are salient passages from the Lord Chancellor's judgment:—

"The Irish Free State is, in their Lordships' judgment, bound by the Acts of the Imperial Parliament in the same way as any other of the Dominions; if it were not for Sec. 2 of the Statute (The Statute of Westminster 1931) the Oireachtas would have no power to amend or repeal an Act of the Imperial Parliament and have now such power only, so far as any such Act is part of the law of the Dominion, in virtue of Sec. 2 of the Statute. Hence the Act No. 6 of 1933 and the Amendment No. 22 of 1933, and certain other Acts of the Oireachtas not here material which contain amendments of the Articles which are not within the terms of the Treaty, are valid Acts of the Oireachtas only in virtue of the Statute. For the Statute alone gives the Oireachtas power to repeal or amend the Constituent Act, which has the force of an Imperial enactment by reason that it is embodied in the Irish Free State Constitution Act, 1922."

And again:—

“(ii) Before the passing of the Statute of Westminster it was not competent for the Irish Free State Parliament to pass an Act abrogating the Treaty because the Colonial Laws Validity Act forbade a Dominion Legislature to pass a law repugnant to an Imperial Act.”

And again:—

“It would be out of place to criticise the legislation enacted by the Irish Free State Legislature. But the Board desire to add that they are expressing no opinion upon any contractual obligation under which, regard being had to the terms of the Treaty, the Irish Free State lay. The simplest way of stating the situation is to say that the Statute of Westminster gave the Irish Free State a power under which they could abrogate the Treaty and that, as a matter of law, they have availed themselves of that power.”

The extreme embarrassments involved in the purely legalistic view of the Anglo-Irish Treaty are here seen emerging manifest and arresting. If the Treaty was an imperialistically imposed law, here was a further imperialistically imposed law warranting its total extinction. Where was there room for contractual obligations in the midst of legal constraint? is compliance with law a matter of contract with the State? And where is there any precedent for an Imperial Legislature conferring express legal powers upon a subordinate body to violate its contract with the sovereign authority.

Now it behoves all persons of good-will to practise moderation of language in criticising dignitaries. But the gravity of the issues involved requires that certain things should be said. It cannot be denied that the Judicial Committee was composed of judicial personages of distinguished professional competence and of high character. It cannot be doubted that they acted in what they believed

to be strict accordance with the obligations of their judicial office and to the best of their juridical ability. Nevertheless the result was to be deplored—and the methods adopted in attaining it open to certain very serious criticisms.

The Judicial Committee, upon a preliminary point as to the competence of the appeal, made a pronouncement at large upon the whole position as to the Treaty and the Constitution.

In the first place it was unnecessary. In the second place it was a one-sided pronouncement after no more than a partial consideration of the full argumentative field. In the third place it was a sterile pronouncement, barren of self-justification, since it contained no reconciliation of the apparent inconsistencies of the propositions laid down with the statutes of which it treated, the constitutional position to which it related and the previous action of the State and of the tribunal itself which it ignored.

The pronouncement was unnecessary inasmuch as the decision which it accompanied was merely that its appellate functions as regards the Irish Free State were now validly terminated. There was no real question as to the validity of the Act terminating its functions. Consequently a pronouncement *in articulo mortis*, if not actually *post mortem*, covering a wide range and, to a considerable extent, breaking new ground, would seem to be singularly inappropriate to the occasion.

It was a one-sided pronouncement inasmuch as it purported to lay down far-reaching propositions reflecting upon the constitutional position, rights, and action of the Irish Free State in its relationship with the United Kingdom and the British Commonwealth of Nations, in the absence of any representation of any of these three bodies, and without adverting to the fact that the Statute of Westminster, which it purported to apply, was not an "imposed" law but as disclosed on its own face, by its own express

terms, the legal embodiment and implementation of a considered and agreed constitutional arrangement.

It was a sterile pronouncement for it disclosed no basis in reason, statute law or constitutional principle for its stark affirmations. No explanation is vouchsafed as to why the Act of State which produced Anglo-Irish peace in 1921 is to be ignored as an Act of State and why its plain purport is to be frustrated in interpreting the statutes which implemented it. The paradox of riveting subordination upon Ireland by a statute declaring her "co-equal" status is left unexplained—as is also the further paradox of the statutory ratification destroying the conventional basis of the Treaty itself and the authority of the other signatory whose ratification was treated as equally essential.

Nor is that all. To attain these paradoxical results it was necessary to place the Irish Free State under the yoke of the Colonial Laws Validity Act, 1865. This was done in patent violence to the statutory implementation of the Treaty which excluded any operation of that Act as regards the Irish Free State. There is not one single word in the Irish Constituent Act, in the Constitution itself, or in the British Act ratifying that Constitution as part of the Treaty Settlement, to warrant a claim that the Colonial Laws Validity Act, 1865, was to affect the Irish Free State. On the contrary, as has been seen (see p. 112 above) the express provisions of these enactments exclude it from the categories of laws thereafter to affect the Irish Free State.

This point as to the Colonial Laws Validity Act, 1865, is a crucial one and it requires some development. It would appear from the Lord Chancellor's words which are quoted above that the tribunal considered that it was warranted in holding, by general implication, that the Colonial Laws Validity Act, 1865, was applicable to the Irish Free State as a Dominion. Warranted by what? By the intention of the Legislature? Surely not. That

intention is to be deduced in accordance with established principles of statutory interpretation. Does not the principle: "*Expressum facit cessare tacitum*" clearly apply? The Dominion status of the new Irish Free State was worked out provisionally in a series of statutory provisions arrived at by agreement. By the combined effect of Articles 2 and 73 of the Constitution and Sec. 3 of the Confirmatory (British) Irish Free State Constitution Act, 1922, it is provided that no then existing British law was thereafter to affect the Irish Free State except by the will and act of the Irish Oireachtas. And every general provision of the Constitution—an agreed instrument and part of the ratified Treaty settlement—looked to complete co-equality as the badge and attribute of the Dominion status which the Constitution and the attendant legislation were clothing with its appropriate statutory expression.

It is well-nigh impossible, therefore, to conceive that the Judicial Committee can have intended to hold, advisedly but without explanation, that its general implication availed to override and negative these express statutory provisions and to subject the Oireachtas to the Colonial Laws Validity Act, 1865, in spite of them. It would seem rather to have assumed through inadvertence that the Irish Free State—as, indeed, the Lord Chancellor said—was in the same position as the other Dominions. The sections cited above show that it was not in quite the same position—for, in the case of the Irish Free State, express enacting words in a British statute gave legal form to what the other Dominions had—up to this time—only by constitutional right. And this had been done in the ratification of the Irish Constitution with its declarations of co-equality and independence of British legislation. The sections were clearly aimed by the draftsman at shutting the door on any such implication as the Lord Chancellor employed. His error would thus appear to be none other than a natural consequence of adjudicating in the absence of the parties

primarily interested and without a full exposition by Counsel of respective argumentative positions.

The wide generality of the language of the Lord Chancellor invites comment. He speaks of certain other Acts of the Oireachtas as being "not within the terms of the Treaty," although they had not been brought to the judicial knowledge of the tribunal and although their quality and terms remained uninvestigated. Nor does he furnish any test by which consistency or inconsistency with the terms of the Treaty are to be judged. The mind of the Judicial Committee—so far as the judgment goes—appears to have been closed to the fact that the Dominion status which is the dominant note in the Treaty provisions had now been defined and that the Statute of Westminster was the legal measure universally agreed to by all the nations of the Commonwealth, designed to remove all legal and legalistic impediments to the possession of the rights appurtenant to it by the several named Dominions, including the Irish Free State.

The Judicial Committee thus presented one final paradox for the edification of students of constitutional law. The several Dominions and Great Britain having solemnly decided what Dominion status is, the Irish Free State is forbidden to enjoy it by the terms of the Treaty which gave it. The judgment of the tribunal affords no faintest glimmer of light to illumine the obscurities of so flat a contradiction. Did it hold—to adopt Mr. Amery's graphic phrase—that Ireland's Dominion status was to be kept in cold storage for ever at the temperature of 1921-22? How could it be done? There existed in 1921-22—admittedly—no detailed specifications of Dominion status, though the central principle of constitutional sovereignty was well established. How then could they be stereotyped—and preserved unchanged for an indefinite period? And what of Article 50 of the agreed Constitution which authorised future amendments of the Constitution "within the terms of the Scheduled Treaty." Were these future amendments

to be controlled by a retrospective regard to definitions that in 1921-22 did not exist? The Treaty—admittedly—was to prevail: where was there any limitation as to date in its opening words, “Ireland shall have the same constitutional status . . .”

So ended the Privy Council Appeal so far as the Irish Free State was concerned. It had been abolished in 1933. But its posthumous activity in considering and accepting its own demise was made the occasion of this final pronouncement. The Irish Free State was concerned with the decision alone. The expressions of opinion which accompanied it are without authority to bind and without self-demonstrating merit to persuade. The episode is regarded in Ireland as justifying to the full the dislike with which its limited jurisdiction in Irish affairs was from the outset regarded—and as explaining in no small measure the previous decision of the Commonwealth that if it was to have a central tribunal for Commonwealth purposes it was not to the Judicial Committee of the Privy Council that it would look. The Privy Council appeal is a relic of Colonial days when it was by no means unaffected by considerations of the policy of the Colonial Office administrators. It would appear to be still somewhat affected by the traditions of earlier days and to allow itself to be swayed by considerations—if not exactly of public policy—at least of what it considers that public policy ought to be.

(g) *The Position in 1937.*

What, then, is the Relationship between Ireland and Britain?

The Anglo-Irish Treaty, 1921, remains. It remains as an international agreement. It is, at the least, *de facto* operative. And all discussion regarding the further constitutional relationship between the Irish Free State and Great Britain must necessarily be conditioned by the quality of Dominion status so long as the Treaty stands.

What is that Dominion status? Is it the "cold storage" status of the British legalists? Or is it the status which it was in the power of Britain, with the consent of the Dominions, to grant and which she purported to grant? Is it the status of other Dominions or is it something *sui generis* to be forced upon the unwilling grantee in substitution for that which it thought itself entitled to from the outset? The proceedings of the several Imperial Conferences from 1917 to 1930 furnish the reply. It is a reply assuredly binding upon all those freely associated nations: Canada, Australia, South Africa, New Zealand, Ireland and Britain, which participated in them, assented to and accepted the several resolutions recorded in them and requested, and consented to, the Statute of Westminster, 1931, as the legal and formal consummation of those resolutions so far as legal and formal considerations were relevant to or requisite for their unquestionable validity.

The Irish Free State, having acquired Dominion status by the Treaty, participated, as a Dominion, in all the proceedings of the Commonwealth for the constructive elucidation of that status in its application to the organic relationships of the Commonwealth. It is a named party to the constitutional compact which resulted. It is a named possessor or recipient of the several rights and powers, whether inherent, legal or constitutional, which the specific and unqualified agreement of all the members of the Commonwealth proclaimed and which, in virtue of the same agreement, were ratified, confirmed, and established by the Statute of Westminster. What the Anglo-Irish Treaty gave the later Pact, the Statute of Westminster, confirmed. The Treaty drew the outlines and indicated the scale and the background. The Statute of Westminster filled in the details in their due perspective.

Dominion sovereignty stands fully established. The apparent exceptions to it are additional proof, when they are examined, of its agreed existence. They arise in each

case from the voluntary acts of the legislatures concerned and they are designed for the preservation of the rights of provinces which have accorded a limited authority to a central legislature. All other exceptions are terminable at the will of the Dominion legislature. None of the exceptions relate to the Irish Free State.

The Oireachtas of the Irish Free State is, by sovereign right, in process of remodelling its Constitution. Who is entitled to say it nay? The original Constitution was limited by reason of the opposed views of the signatories as to the true bearing of Dominion status in particular aspects. But the Treaty, with its bestowal of Dominion status, has always remained dominant. It gave Dominion status without reservation or qualification. The obscurity has been removed. There is no longer room for opposed views. Consequently the limitations in the Constitution no longer apply. It may be that the limitation of the Constitution in 1922 was a condition of British ratification. True. But the power of constitutional amendment in accordance with the Treaty was conceded. The test, therefore, was and remained: "What is Dominion status?" The further compact of 1931, binding both Britain and the Irish Free State, has settled that point. The Constitution can consequently be amended, by virtue of the Treaty, in accordance with the now agreed interpretations of Dominion status. If there be any remaining doubts they must be resolved by conference and agreement between the signatories, but not by the British Privy Council whose very limited original functions in this regard are happily ended.

Dominion sovereignty is unqualified as to internal affairs. As to external affairs it is qualified only by "a common allegiance to the Crown" and the obligations involved in being "freely associated as members of the British Commonwealth," functioning by methods of conference and agreement. Freedom of association clearly implies freedom of dissociation. But there is no force logically tending towards

dissociation save the doubt as to the reality of the freedom of choice. Nor is there serious menace to the Treaty by which that free association was granted and accepted, save in so far as it is perverted into an alleged warrant for repudiating it. The enduring strength of any treaty is measurable by the quality and degree of agreement underlying it. Where coincidence of view and interest become warped into divergence, the framework is soon subjected to a breaking strain. The postulates of Commonwealth cohesion prescribe "every self-governing member . . . is now master of its own destiny . . . in fact . . . it is subject to no compulsion whatever." Without freedom from constraint there can be no freedom for constructive purposes. The quality of the allegiance to the Crown, which is declared in the Statute of Westminster to be the symbol of the free association of the members of the Commonwealth, has not been authoritatively defined. But the Preamble of that Statute proclaims it to be "in accord with the constitutional position" that alterations of the law relating to the Succession to the Throne and the Royal Style and Titles shall require the consent of all the Parliaments of all the members of the Commonwealth. There is, therefore, no question of mystical or medieval theories of kingship, and no saving of any doctrine of Divine Right. It is a constitutional Crown and of symbolical import. It carries with it no unexpended prerogative beyond the control of Dominion legislatures. This would appear to accord with the view underlying the Oath referred to in the Treaty which conditioned allegiance by reference to the law and the constitutional arrangements resulting from Dominionism.

(h) *The Casus Belli*

Is it a Worthy One?

The exercise by the Oireachtas of its sovereign power to remodel the Irish Constitution is the cause of the prosecu-

tion of Britain's economic warfare against the Irish Free State. This is frequently denied. Assurances are tendered to the doubtful that there is no thought to inflict punitive measures—that no economic pressure is being applied with ulterior objects. The sole object, it has oft-times been asseverated, is to collect, by the levying of special import duties on Irish produce, the sums which it is alleged that Ireland is wrongfully withholding from Britain.

The very opposite is the fact. If the money issue was the main issue it would have probably been settled long since.

Where an anti-Irish propaganda, systematic and all-pervasive, discolours almost all news and opinion disseminated for British, European and overseas readers it is necessary to vouch almost every point by express quotation. For the foregoing statement a sufficient authority is the Secretary of State for Dominion affairs, Mr. J. H. Thomas, who informed the House of Commons on 10th July, 1935:—

“No one assumes for a moment that the mere question of the annuities is the only difficulty. We should soon get over that difficulty if that were the only matter in dispute.

“But are the Oath of Allegiance, the Governor-General as the King's Representative, ‘a foreign King’ as defined by Mr. de Valera, not fundamental to any settlement? Of course these things are fundamental. Of course they have to be brought into review” (Hansard, 10th July, 1935. Col. 438).

These matters as to the Oath of Allegiance, the Governor-General as the King's Representative—“a foreign King”—are matters of the internal policy of the Irish Free State. Is there any question that the Governor-General did represent the King or that the King is a non-Irish King or that it may be preferable that Irish Ministers should have direct access to the King and not merely access to a representative of the King? Everyone will recognise that there

is scope for difference of view as to the most appropriate handling of such subjects when, as in the case of Britain and Ireland, the historical background is so utterly different. But is that a sufficient cause for economic warfare?

Questions emerge

“Is it becoming for Britain to wage economic warfare to prevent the Irish Free State from shaping its institutions according to its own desire and in conformity with its national rights derived under the Treaty and the Statute of Westminster?”

“Does the spirit of hostility which initiates and prosecutes warfare in the economic sphere tend towards the integration of the Commonwealth—or of the English-speaking races in the yet larger sphere?”

“Does not economic warfare and the bitter memories which it implants tend to impede the marshalling and realignment of the several spiritual forces and philosophies, national, racial, cultural which are the principal hope for the survival of ordered progress and Christian civilisation in the new world order?”

CHAPTER VIII

COMPLETING THE TREATY SETTLEMENT—FURTHER CAUSES OF ANGLO-IRISH FRICTION

(a) Financial Relations and the Boundary

Two controversial subjects were left over by the Articles of the Treaty for subsequent adjustment. It was not possible to settle them out of hand. The first was the financial adjustment between Britain and Ireland (Article V). The second was the future relationship of Northern Ireland (as created by the Government of Ireland Act, 1920) with the new Irish Free State and, in the event which happened, the delimitation of the Northern Ireland Boundary (Articles XI–XV inclusive).

The national finances of the new Irish Free State had to be disentangled from those of the remainder of the United Kingdom. A new Irish Exchequer had to be constituted. The old Irish Exchequer had disappeared in 1817, as a result of the Union of 1800, and thenceforward the revenue and expenditure of the two countries had been dealt with on a single account under the control of the British Treasury. Now, there was to be a national Irish Exchequer for the Irish Free State, for the whole of Ireland—or, if Northern Ireland, with its six counties, exercised its option to exclude itself—for the diminished area. On the administrative side therefore the financial settlement hinged upon the inclusion or exclusion of Northern Ireland, and, further still, if there were exclusion, upon the size of the excluded area.

The two matters of national finance and territory were thus interlocked. There could be no final financial settle-

ment until the two questions as to Northern Ireland were determined.

The basis of the financial settlement was indicated on very broad lines by the Treaty. Ireland was henceforth to be financially independent. She was to own, to control, and to dispose of her own revenues and resources. Following the precedents of Dominionism she was to be free from all British taxation and from all liability to contribute to Imperial expenditure unless by voluntary and unconstrained contribution for the common purposes of defence and such like matters. But, in withdrawing from the Union partnership with Britain and taking possession of her own national revenue from whatever source derived—she was to shoulder the exclusive liability for her own future expenditure—and she was to undertake liability for her appropriate share of the (then existing) joint liabilities. And to complete the analogy of a dissolution of partnership, her appropriate share of the joint liabilities was to be fixed at an amount which should be measured with due regard to “any just claims on the part of Ireland by way of set-off or counterclaim” (Article V).

The reference in this phrase was obviously to assets, actual or potential, which represented the results of partnership expenditure, and to claims in respect of past taxation of Ireland which might be shown to have been in excess of that warranted by the terms of the partnership.

The position of Northern Ireland was very different. If it elected to remain a part of the parent Ireland it would share in the financial benefits of the Treaty settlement. But if it exercised its opinion to “contract out,” it was to remain a portion of the United Kingdom and to be subject to the system of taxation elaborated in the Government of Ireland Act, 1920. This system had, in the eyes of Irish publicists, tightened up the previously existing Union system to Ireland’s disadvantage—in particular by imposing a

substantial levy for Imperial expenditure as a first charge on the revenues of Ireland.

The nature of these changes—the advantageous position of the Irish Free State and the nature of the choice presented to Northern Ireland—was clearly understood at the time of the negotiations. Thus Mr. Lloyd George, Prime Minister of the United Kingdom, when endeavouring to persuade Northern Ireland not to jeopardise the success of the broad Imperial policy of the Treaty by persistence in its claim for exclusion from the Irish settlement wrote shortly before the Treaty:—

“In the second place the finance of the Government of Ireland Act would necessarily have to be re-cast. It is the essence of Dominion status that the contribution of a Dominion towards Imperial charges is voluntary. If Northern Ireland were part of the Irish State its contribution would be voluntary, like those of the Dominions. On the other hand, if Southern Ireland became a Dominion while Northern Ireland remained a part of the United Kingdom with the essential corollary of representation in the Imperial Parliament, it is clear that the people of Northern Ireland would have to bear their proportionate share of all Imperial burdens, such as the Army, Navy and other Imperial Services in common with the taxpayers of the United Kingdom. The Members for Northern Ireland at Westminster would otherwise be voting for policies in Parliament, the expense of which they would not share. It would be inevitable, if Northern Ireland were to remain a part of the United Kingdom, for Belfast to bear the same burdens as Liverpool, Glasgow, or London” (Letter to Sir James Craig, 10th November, 1921).

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It was realised by Sir James Craig, Prime Minister of Northern Ireland, in his letter of protest to Mr. Lloyd George a few days after the Treaty was signed:—

“The principle of the Government of Ireland Act, 1920, was to give equal rights and privileges to the

North and to the South of Ireland. This principle has been completely violated by the Agreement made with Sinn Féin, whereby the Irish Free State is relieved of many of her responsibilities in regard to the British Empire, and is to be granted financial advantages which you have made clear are expected to relieve her considerably from the burden of taxation which must be borne by us and other parts of the United Kingdom. Ulster, on the other hand, is only to obtain such concessions if she first consents to become subordinate to Sinn Féin Ireland" (Letter to Mr. Lloyd George, dated 14th December, 1921).

And it was accepted by Lord Londonderry, as spokesman for Northern Ireland, in the House of Lords:—

"For our part we adhere to the modified form of union of 1920, which carries with it the representation of Ulster in the Imperial Parliament, and the bearing of those financial burdens which appertain to Ulster, as an integral part of the United Kingdom. I should like to make that very clear, as I have seen it stated in the Press that we are not prepared to bear those burdens. I have seen, as has all the world, that financial inducements, not wholly unaccompanied by threats of financial pressure, have been held out to us in Ulster to join the Parliament of this so-called Free State of Ireland. . . ."

"But we have told you already, and I repeat it now, that we fully realise the position, and that we are determined to remain in connection with the United Kingdom, notwithstanding that our determination carries with it a financial liability. I am making no complaint. The last thing I should think of doing now is to complain. Let me say this, however. The actual incidence of this burden is a matter for financial experts to determine, and I am prepared to leave it with them. With all the facts before them, they can arrive at the just amount. I do not ask, we do not ask, for any favour whatsoever" (Hansard, 14th December, 1921, Cols. 66-67).

These two matters, then, the Financial Adjustment and the position of Northern Ireland with special reference to

the Boundary, remained over in 1921. Until they should be finally completed the Treaty settlement would be incomplete. That completion is claimed to have been consummated by two instruments. The first was an Agreement dated 3rd December, 1925. The second was the Heads of an Agreement dated 19th March, 1926. The first was entitled:—

“Agreement Amending and Supplementing the Articles of Agreement for a Treaty between Great Britain and Ireland to which the Force of law was given by the Irish Free State (Agreement) Act, 1922, and by the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922,”

and it dealt finally with the constitutional position and the territorial boundary of Northern Ireland and, in part, with Anglo-Irish financial relations. It was executed by delegates of the Government of Great Britain, of the Irish Free State and of Northern Ireland whose signatures were appended in express terms “on behalf of” those Governments respectively. It was confirmed in accordance with Article V “by the British Parliament and by the Oireachtas of the Irish Free State,” by the British and Irish Statutes respectively 15 and 16 Geo. V. c. 77 and the Irish Free State Act No. 40 of 1925. This instrument therefore belonged to the same category as the original Treaty. The second, a document which has been a focal point of subsequent controversy, was entitled:—

“Heads of the Ultimate Financial Settlement Between the British Government and the Government of the Irish Free State.”

After the last line of the text the names: “Winston S. Churchill,” and “Eamon de Blaghd,” and date, “19th March, 1926,” follow. The document is not in form an agreement. In strict conformity with its title, it comprises

no more than heads of an agreement. It might be suggested that it contains the heads of a contemplated agreement. Thus it naturally contains no provision for its confirmation by any Legislature, and it was not, in fact, submitted to the British and Irish Legislatures for approval or confirmation. The two gentlemen who signed were, in fact, the British Chancellor of the Exchequer and the Irish Free State Minister of Finance, but there are no words to signify that they signed as such, or that they signed in any representative capacity.

No question of the validity of the first of these two documents has ever arisen. As to the second, acute controversy subsequently arose. It culminated—and continues—in the economic warfare waged by Great Britain on the Irish Free State. A change of Government in the Irish Free State brought the financial question into the foreground after the alleged agreement had preserved the *status quo ante* for some six years.

The British Government has asserted that the second document "was signed on behalf of the British Government and on behalf of the Government of the Irish Free State," and has insisted that it is as valid and binding as the Treaty itself:—

"This undertaking was confirmed in the 'Heads of the Ultimate Financial Settlement between the British Government and the Government of the Irish Free State' which was signed on behalf of the British Government and on behalf of the Government of the Irish Free State, on the 19th March, 1926, and discussed in Dail Eireann on the 8th December, 1926.

"The first Head of this Settlement reads as follows:—
'The Government of the Irish Free State undertake to pay to the British Government at agreed intervals the full amount of the annuities accruing due from time to time under the Irish Land Acts, 1891–1909, without any deduction whatsoever whether on account of Income Tax or otherwise.'

"As stated in my despatch of 23rd March, His Majesty's Government in the United Kingdom regard undertakings of this character as binding in law and honour on the Irish Free State, whatever administration may be in power, in exactly the same way as the Treaty itself is binding on both countries." (Despatch of H.M. Secretary of State for Dominion Affairs. Cmd. 4056, April 9th, 1932.)

The Irish Free State Government, on the other hand, has maintained that the document is not in form or in fact an international agreement, that it was not submitted for approval to nor approved by the Oireachtas and that no such arrangement as it contemplates has ever been accepted save temporarily and provisionally on the Irish side. It maintains that no final financial settlement under the Treaty has ever been effected, and that the true ownership of the moneys in dispute remains open to discussion and that its rights in that regard have not been concluded by the Treaty settlement or by any instrument of comparable validity. It consequently withheld the moneys in dispute pending a final settlement.

(b) What has lain Behind. Internal Politics in Both Countries.

It is convenient, at this point, to consider briefly the political background of this series of transactions from its inception in 1921 down to the present time. The internal politics of the two countries are relevant to the study of their mutual relations in so far as they affect the course steered by those in control, from time to time, of the navigation of the two ships of state.

The Treaty brought peace by the agreement of the two warring Governments. And that the two peoples desired peace is shown by the fact that the Treaty reached its final ratification in December, 1922, after an intervening General Election in each country.

But there was also a strong volume of dissent in each country. In Ireland it was not merely the active dislike of the Treaty in Northern Ireland—for Northern Ireland not only repudiated the benefits of the settlement for itself if they had to be shared with the rest of Ireland but ardently desired that the rest of Ireland should be deprived of them also. This Northern Ireland dislike of the Treaty must rather be taken as part of the British opposition to the Treaty—an opposition which it did much to originate, to organise and to embitter through its British affiliations. But in Ireland itself, the parent Ireland, there was a very strong anti-Treaty Party, led by Mr. de Valera. The objections were that the settlement involved too great a concession on the Irish side, that the partition of Ireland would certainly result, that the Dominion status which it purported to confer would be negated by legal and administrative qualifications introduced in its working out, and that it had been forced upon the Irish delegation by duress, by the threat at a critical moment of immediate and terrible war unless it was immediately accepted.

In Britain, on the other hand, there was strong opposition—principally from that section of the Conservative Party—known as the Die-Hards—who had been active in instigating and fomenting the Ulster resistance to Home Rule in 1911 to 1914. This section had always objected to any effective recognition of Irish nationhood and now desired the maintenance of the system, created by the Government of Ireland Act, 1920, whereby Northern Ireland, firmly established as the citadel of the old British politico-religious ascendancy, was able to forbid any advance towards Irish unity or Irish autonomy. The idea had endured since the events of 1911-14 that the ascendancy party in Ulster could provide a militant force to put a brake on the parliamentary democracy of Britain and that, as occasion might arise, Northern Ireland would provide a bridgehead for the reconquest of national Ireland,

and with its trained sectarian levies suitably organised would act as the spear-point and cutting edge of the attack. The militant section of the British governing class and the embittered remnant of the disestablished Irish ascendancy caste were close and intimate allies.

Thus in February, 1922, Dublin was distracted by the ardent debate between the pro-Treaty and anti-Treaty parties, whilst the Provisional Government was struggling to get effective control of a country suffering from an inter-regnum and the aftermath of guerilla warfare. And already in Britain the anti-Treaty faction was mustering its forces. Headlines in *The Times* of 15th February, 1922, read: "Attack on the Irish Treaty," "Die-Hards Gaining Strength," "Feared Revolt of 150 Unionists." The attack failed. A point of view which probably determined the issue was well put by Mr. Neville Chamberlain, then a private member and now Chancellor of the Exchequer:—

"One of our great difficulties undoubtedly, in dealing with Ireland in the past, has been the fact that we have so often changed our policy, and thereby given grounds for suspicion that we are not to be trusted to keep to our undertaking. That consideration alone would make me hesitate a long time before throwing on the scrap heap a policy which has been sanctioned so recently" (Hansard, 16th February, 1922. Col. 1311).

The crisis passed. Later on in the year, however, the Coalition Government of Mr. Lloyd George fell and, after a General Election, was replaced by a Conservative Government under Bonar Law who from the days of 1911-14 onwards had enjoyed the confidence of the so-called Die-Hards and of the Ulster partisans. After a few months Mr. Bonar Law passed from the scene and was succeeded by Mr. Baldwin, the present Prime Minister, without affecting the political complexion of the party. With two brief intervals, during which Labour Governments were

in power, in 1924 and 1929-31, Mr. Baldwin and his party have remained in effective control of British policy towards Ireland.

In Britain, as in Ireland, in spite of opposition, the Treaty was adopted. Mr. Bonar Law induced his party to support its ratification. Mr. de Valera, in face of the Treaty's adoption, maintained the anti-Treaty attitude as a foremost element in the programme of the Irish Republican Party and, once active opposition was over, awaited developments.

The developments as they came told in Mr. de Valera's favour. Britain lowered the prestige of the Treaty by entering a formal protest against its registration at Geneva. Events in Northern Ireland pointed not merely to the permanence of partition but to the total subjection and virtual disfranchisement of the large Nationalist and Catholic minority. Northern Ireland "contracted out" of the Irish Free State. The boundary controversy left the impression that the pro-Treaty Government of Mr. Cosgrave had been badly out-manceuvred, and the prospects, if not the actual promises, of a territorial readjustment, held out during the Treaty negotiations were being falsified in the result. And when the Boundary Agreement of 3rd December, 1925, was executed in circumstances of haste bordering upon precipitation it was seen that the constitutional arrangements pointing through a Council of Ireland to Irish reunion—arrangements originated in the Government of Ireland Act, 1920, and adopted in the Treaty—had been formally swept away. The unfavourable impression that resulted was accentuated by the financial arrangements which accompanied and followed the boundary agreement and which, though not clearly stated or understood at first, also evoked suspicion and resentment.

The inevitable reaction of Irish opinion brought Mr. de Valera into power in January, 1932. It was no sudden

outburst of petulant disappointment. It was the gradually mounting tide of conviction based upon a growing realisation of obscured facts. The electoral system of the Irish Free State, based on Proportional Representation, does not lend itself to a spectacular swing-over of votes. The centre of gravity in Irish political thought had shifted. Many of the most convinced adherents of the Treaty transferred their support to the Republican Party as the party of protest, in the belief that the Treaty settlement had been betrayed. The course adopted by Mr. de Valera tended towards national unification. Whilst fully adhering to his Republican and anti-Treaty convictions he assumed control of the Government and administration established under the Treaty and, as a matter of practical statesmanship, conducted both on the basis that the Treaty was *de facto* operative. He announced that the decision whether the Treaty was to be maintained or repudiated must be the decision of the Irish people at a general election taken on that specific issue—and that in due course and at an appropriate juncture that decision would be taken. And that announcement remains a cardinal factor in the Anglo-Irish situation to-day. His intended course in the meantime is best described in his own words:—

“but the British Government can rest assured that any just and lawful claims of Great Britain or of any creditor of the Irish Free State will be scrupulously honoured by its Government.

“In conclusion, may I express my regret that in the statement conveying to the House of Commons the information given you by our High Commissioner that part of his message was omitted which assured your Government of the desire of the Government of the Irish Free State that the relations between the peoples of our respective countries should be friendly. These friendly relations cannot be established on pretence, but they can be established on the solid foundation of mutual respect and common interest, and they would long ago have

been thus established had the forces that tend to bring us together not been interfered with by the attempts of one country to dominate the other" (Despatch dated 5th April, 1932, from Mr. de Valera, Minister of External Affairs, to Mr. J. H. Thomas, Secretary of State for Dominion Affairs).

The firm and prudent statesmanship of this attitude disappointed many—adversaries even more than adherents. But it tended towards the consolidation behind Mr. de Valera's Government of the main body of national thought and feeling. Mr. de Valera assumed charge of Ireland's rights under the Treaty whilst expressly reserving to himself the right, which he had never surrendered, of asking the Irish people to denounce the Treaty. And he was in a strong position. For now his initial objections to that Treaty could be supported by its demonstrated defects if it could be shown to have failed in practice.

The controversy with Britain that ensued related, as has been seen, to British claims to the annuities under the disputed Agreement of March, 1926, and to certain amendments of the Irish Constitution effected by the Oireachtas at the instance of Mr. de Valera, which the British Government alleged were in violation of the Treaty. An immense *réclame* was secured for reiterated British propositions that the Irish Free State was violating its legal and honourable obligations, that it was dishonouring the Treaty, that it had made default in the discharge of its (equally binding) financial obligations. The clarion voice of press and news agencies, British inspired if not actually British controlled, proclaimed the infamy of treaty breaking with all the accumulated emphasis which had been gathering, since Mr. de Valera's accession to power, in anticipation of a formal rupture of the Treaty. Members of the British delegation to the Imperial Economic Conference at Ottawa announced that they would enter into no agreement with the Irish Free State, since it did not keep its engagements. The

protagonists on the British side were Lord Hailsham, in the House of Lords, and Mr. J. H. Thomas, in the House of Commons. The former was understood to be the Chairman of the sub-committee of the Cabinet in charge of its Irish policy, and both were members of the delegation to Ottawa. It was even reported in the public press that they intervened from mid-Atlantic by wireless message to prevent the Cabinet from coming to terms with Mr. de Valera, who had been invited to London with Mr. Norton, the Irish Labour leader. Lord Hailsham, in moving the Second Reading of the Irish Free State (Special Duties) Bill told the House of Lords:—

“Unhappily it would seem that an Irishman, at any rate, does not desire to observe the obligations which the Irish Free State has undertaken if they should prove inconvenient to carry out,”

and indicated, not obscurely, that the economic weapon now provided might have other uses than in regard to the annuities:—

“It deals only with financial matters, and it deals, primarily at any rate, with the dispute with regard to the payment of annuities.”

There is no doubt that it was anticipated that British economic pressure, for which provision was thus made, would prove irresistible. Nor was this idea without support in Ireland.

In this atmosphere the economic warfare was launched in 1932 by the imposition of a drastic tariff upon imports of Irish produce. In due course counter-tariffs followed in Ireland and further measures from Britain.

The development of the discussion revealed the rather inadequate backing in legal merits for the controversial flamboyancy of Lord Hailsham, and Mr. J. H. Thomas. There were grave legal impediments plainly visible to

the British claim to the annuities—a claim which, in the earlier stages at least, was put forward in a manner which invited criticism from the dispassionate—whilst, on the constitutional side, the argument that the Treaty was being violated by the amendments to the Irish Constitution was by no means universally accepted by students of constitutional law. The Treaty itself remained unchallenged. On the other hand, Irishmen resented the charge that the Irish Free State had made “default” in withholding payment under a claim of right and with an offer to accept arbitration—the term was more properly applicable, it was retorted, to the action of Britain in withholding payment in respect of its debt to the United States of America, which was due under an agreement of undisputed validity.

The progress of the economic war, after causing much painful loss in Ireland and more than a little dislocation of old established trade connections on both sides, ultimately completed the consolidation of Mr. de Valera’s position as the Irish national leader. It came to be generally felt that the Irish Free State was being attacked because it was claiming a fair deal under the Treaty settlement. A permanent partition of Ireland had been somehow brought about—contrary to natural expectation—and the arrangement was embodied in the valid instrument of December, 1925. A financial burden—also contrary to natural expectation—had been imposed, and the arrangement was found to rest upon instruments of an ambiguous and questionable nature. The gain of Dominion status was revealed as illusory, since British lawyers and statesmen alleged a moral or honourable bar to Ireland’s exercising the powers common to all the Dominions. The attempt to set up Irish rights in those respects was being visited with economic war. Ireland tightened its belt and concentrated its energy on taking the strain. Mr. de Valera’s earlier doubts were felt to have been well-founded. He was the stronger for it now. And he became stronger still when

his spirited and skilful resistance to the economic war averted defeat. For not only was internal protest largely allayed but the sting was taken out of the external attack by a "gentleman's agreement." The British Ministers who would enter into no agreements with a perfidious Ireland that violated its legal and honourable obligations had now brought themselves to offer an arrangement for the mitigation of the more inconvenient of its war-time losses and based it upon an uncovenanted agreement with Ireland, resting upon good faith alone. In Irish—and indeed in many other—eyes that compromised the British position irretrievably.

And so came about one of history's strangest transformations. The Treaty had been opposed in Ireland by Mr. de Valera and in Britain by the Die-Hard Conservatives. The former has never abandoned his personal dislike of it nor abjured his personal freedom to ask Ireland to denounce it. The latter, with an equal dislike of it, have almost from the outset professed to accept and honour it "in the letter and in the spirit." Both are now in control of the national policy of their respective countries. But Mr. de Valera, inasmuch as he accepts it as *de facto* operative, is seen defending the Treaty as the great Act of State of 1922 against its devitalised effigy as put forward to-day by Lord Hailsham and the other purveyors of Privy Council paradoxes. For the real Treaty was killed by the legalists who converted it into an imposed law. As an imposed law it was placed under sentence of death, with execution of the sentence entrusted to Ireland by the considered action of Britain at the Imperial Conference, 1930. Forthwith its reprieve was then demanded in the name of a resurrection of its original self in scarcely recognisable shape. For Lord Hailsham has failed to relieve the puzzlement of constitutional lawyers as to what survives of the virtue of the original Treaty save the categorical "No" which he appears to be able to extract from its substance for all Irish

tentatives to realise the Dominion status which it purported to assure.

Pro-Treaty Irishmen have lived to admit that Mr. de Valera's distrust of the Treaty has been most abundantly justified in the result. Three main prospects which it held out to Ireland have been withheld from her. The projected unification of all Ireland has been destroyed. Constitutional freedom and an equitable financial settlement have been refused—and the refusal reinforced by economic warfare. The proof of the pudding is in the eating of it.

(c) *The Die-Hard Conservatives in Control from November,*
1922
Re-Moulding the Treaty Settlement

In 1923 the seed was sown for the crop that came to harvest in 1932–37. Legalism ransacked its armoury for weapons. Administrative subtlety sought to temper the wind for the shorn Ulster lamb whilst using the shears on the Irish sheep. Clear enough in retrospect, the purport of the new policy was scarcely perceptible at the time.

The Treaty was ratified in December, 1922. The earliest premonitory symptom of the coming onset of legalism may perhaps be found in the Attorney-General's speech in the course of the ratification debate. Sir Douglas Hogg, an able lawyer of Northern Ireland affiliations, was first elected to Parliament in the autumn of 1922 and was forthwith appointed Attorney-General. His maiden speech was made in this debate. He recalled it, as Lord Hailsham, less than ten years afterwards in the House of Lords, in moving the second reading of the Irish Free State (Special Duties) Bill, 1932, as a prelude to the economic war. The following passage, beginning with a quotation from the earlier debate, illustrates his view, extending over the

ten-year period, that the Treaty operated only as a British law:—

“every member of this House will regard this Bill as a measure of good-will to the people of Ireland, as an indication that Great Britain does intend to implement her obligations to the full, and that even those who are opposed to the treaty recognise and desire to adopt it, and by enacting to carry it out. His Majesty’s Government and the people of Great Britain as a whole will loyally and faithfully observe its terms, with a full hope and prayer that it may turn out for the blessing of the people of Ireland and the cultivation of friendship and amity between that Kingdom and ourselves.”

“For nearly ten years since that Treaty has had the force of law that aspiration seemed to be likely to be fulfilled” (Hansard, 11th July, 1930, Cols. 741–746).

This view, somewhat obscurely indicated in the earlier debate, grew and ripened rapidly. Thus on 2nd August, 1923, Mr. Baldwin, the new Prime Minister, in reply to a question, announced in the House of Commons:—

“In reply to the first part of this question, I must point out to the hon. member that the Articles of Agreement for a Treaty between Great Britain and Ireland which was signed on the 6th December, 1921, was on the 5th December, 1922, embodied in the Irish Free State (Constitution) Act. This Act was passed into law by the Imperial Parliament and His Majesty’s Government are bound thereby” (Hansard, 2nd August, 1923, Col. 1699).

It is significant that the binding quality of the Treaty is said to depend from its having been embodied in the Irish Free State (Constitution) Act, 1922, and not from the parliamentary approval of December, 1921, nor the Irish Free State (Agreement) Act, 1922, which was passed in March, 1922, nine months earlier.

This was obviously a considered statement. It was accepted as authoritative by the Labour Government in the following year:—

“As stated by the late Prime Minister in the House of Commons on the 2nd August, 1923, statutory force having been given to the Treaty, His Majesty’s Government are bound by its terms. In my despatch to you of the 10th April, I intimated to you that His Majesty’s present advisers share that view, and are therefore prepared to exercise all powers vested in them to constitute the Boundary Commission. The Treaty, by reason of the statutory force with which it was invested by Act of the Imperial Parliament in which Northern Ireland is represented, is, in the view of His Majesty’s Government, binding on the Government of Northern Ireland.” (Despatch from Secretary of State for the Colonies to the Governor-General of the Irish Free State, dated 22nd May, 1924. Cmd. 2155.)

The degradation of the Treaty from its high estate as an international assurance thus became accepted British policy. It is seen to have originated in the first part of the year 1923, although it was not propounded in any form calling for formal challenge from the Irish Free State. It was, however, definitely challenged at the end of 1924 when Britain protested against the registration of the Treaty at Geneva. The challenge of the Irish Free State was in clear terms and remains upon the record. It has never been withdrawn.

During the early months of 1923, immediately after the ratification of the Treaty, three other separate occurrences appeared to trench upon the Treaty settlement in virtue of legalistic interpretations in administrative matters:—

- (1) In relation to Northern Ireland Finance and other matters.
- (2) In relation to Irish Free State Finance.
- (3) In relation to Irish Free State legislative independence.

The first followed quick after the final ratification of the Treaty. Its purpose, or rather its apparent purpose which can only be effectively judged by its foreseeable effect, was to relieve Northern Ireland of the unfavourable financial consequences of "contracting out" of the Irish Free State and remaining a part of the United Kingdom under the Government of Ireland Act, 1920. The negotiations were well advanced after the triumph of the Die-hard Conservatives over the Coalition Government which had carried the Treaty and before the ratification of the Treaty was complete. Their effective consummation is found in a Treasury Minute of 15th January, 1923. The arrangement was so timed—doubtless fortuitously—that the Irish Free State Government were in ignorance of it in proceeding to ratification of the Treaty on their side, whilst the Northern Ireland leaders were already assured of the result before the step of "contracting out" was finally taken. The manner in which the re-arrangement thus began of Northern Ireland's financial obligations was ultimately worked out will be dealt with in a subsequent page.

The second was on 12th February, 1923, when the foundation was laid—somewhat insecurely, perhaps—of the British claim to the Land Purchase Annuities which had been granted to Ireland, both Southern and Northern, by the Government of Ireland Act, 1920. Northern Ireland was retaining, and has without protest or difficulty, retained these annuities ever since. But Britain, either on 12th February, 1923, or later,—a good deal of obscurity will be found to envelop the series of transactions,—thought herself entitled to resume them from the Irish Free State. But certainly Britain later claimed them in virtue of an Agreement of 12th February, 1923, between Major Hills, Financial Secretary of the Treasury, and Mr. Cosgrave, President of the Executive Council of the Irish Free State, which provided that the Irish Free State Government should collect them and hand them over "to the appro-

priate fund." The controversy that later enveloped this and the ensuing development will be considered later on.

The third should also, apparently, be dated 12th February, 1923, although it did not actually take place until a month later, when—on the 10th and 11th March—a large number of persons were arrested in Britain and deported for internment in the Irish Free State. The arrests were made under the Restoration of Order, Ireland, Act, 1920. It was stated in the House of Commons that this step was taken at the request of the Free State Government or in consultation with the Free State Government, and the statement has not been contradicted. The arrangement, as it transpired on affidavit in the subsequent *habeas corpus* proceedings in Britain, rested on an oral agreement between the Home Secretary and the Irish Free State authorities. "The Irish Free State authorities" almost certainly signifies President Cosgrave, who, as recorded in *The Times*, was in London on the 9th and 10th February, 1923, visiting the Prime Minister (twice), the Duke of Devonshire, Secretary of State for the Colonies (once), and the Chancellor of the Exchequer, Mr. Baldwin, and certain Treasury officials on both days for negotiations as to "certain administrative and financial matters remaining for adjustment between the British and the Irish Free State Governments." President Cosgrave arrived back in Dublin on the morning of the 13th February, having signed the document referred to in the preceding paragraph on the previous day. The interval between President Cosgrave's visit when he signed the so-called annuities agreement and the internment arrests is accounted for. Sir Douglas Hogg (now Lord Hailsham) the Attorney-General, said in the House of Commons on 12th March, 1923:—

"Assume that you have the request made as it was made here. The Home Secretary has had these cases under consideration for no less than four weeks. . . .

"As the Home Secretary told the House, before he took this action he did me the honour to consult me upon the action he was going to take. It met with my entire and unqualified approval," (Hansard, 12th March, 1923, Cols. 1188-94).

The connection between the two transactions as issuing from President Cosgrave's visit would appear to be established. He was deeply pre-occupied with the precarious position of the Government over which he presided in the Irish Free State; and, in seeking British aid to stabilise it, he was unlikely to be acutely critical of the propositions put before him in the course of the discussions. It is, indeed, extremely improbable that he was aware of the legalistic views which lay behind the willingness to accord the help for which he asked. It remained for the British Court of Appeal to extricate them, by skilled dissection, from the executive action which was impugned and from Sir Douglas Hogg's own argument by which it was supported. It was then revealed that the Attorney-General had misapprehended the effect of the Treaty settlement and of certain provisions of the Consequential Provisions Act, 1922, of an implementary and ancillary character. He argued that the Restoration of Order (Ireland) Act, 1920—a most drastic pre-Treaty Coercion Act—was not expressly repealed and that "there was nothing in the Constitution to contradict it" and that, in virtue of its provisions, the British Home Secretary could legally order the internment in the Free State of persons arrested in Britain. The original arrests were followed up by two Orders in Council of 27th March and 21st April, 1923, for which it is to be presumed that the Attorney-General, as Senior Law Officer, was responsible, and which appear to have issued from the theory of the continued "supremacy of the Imperial Parliament" in spite of the Treaty. The relevant observations of the Court of Appeal were clear and conclusive:—

Bankes, L. J., who presided: "The last Order of 21st April is remarkable not only because of the date at which it was issued, but also because of what it purports to do. In effect, it provides that all the regulations made in August, 1920, including 24B are to apply to the Irish Free State."

Scrutton, L. J.: "But if, as I have held, these Sections, especially sub-Sec. 1 are inconsistent with the Irish Constitution which places administrative powers in the Irish Executive, the Order in Council under this head purports to re-enact in Ireland an Act otherwise repealed. This appears to me clearly beyond the scope of Sec. 6 of the Consequential Provisions Act, and therefore *ultra vires*. It would probably startle the Irish Free State Government to know that His Majesty's Ministers claim that the King, on the advice of his British Ministers, may by Order in Council, impose regulations having the force of statute in the Irish Free State."

Atkin, L. J.: "I share the doubts expressed by Scrutton L. J. as to the validity of some of the provisions of the Order in Council, but as I am clear that the Privy Council was not given any powers to give the Home Secretary executive authority in Ireland which otherwise he would not possess, I refrain from dealing with the matter further," (*Rex. v. Secretary of State for Home Affairs, O'Brien, ex parte*, 1923, 2 K.B. 361).

This drastic rejection of the legalistic thesis resulted in the release and compensation of the interned persons, and in the passing of an Act of Indemnity at Westminster to protect the Home Secretary from legal proceedings. It was to this episode that *The Times* referred in the passage already quoted:—

"The confusion of thought amongst the legal advisers of the Government is inexplicable—except on the supposition that the end would justify the means, as perhaps it has from a political point of view," (10th May, 1923).

But the legalists, securely entrenched in high places, were by no means permanently defeated, as has been seen in previous chapters.

It is appropriate to recall that, almost contemporaneously with the above decision of the British Court of Appeal, the Judicial Committee of the Privy Council, dealing with its first Irish cases, explained that "in giving advice to His Majesty in a judicial spirit they had nothing whatever to do with politics, policies or party considerations," and announced that the tribunal would proceed on the principle of restricting the scope of the prerogative appeal and "would look at the subject matter of appeals from the point of view of the Dominions";—an apparently considered decision whose declared principle was almost immediately relegated to oblivion and was subsequently honoured rather in the breach than in the observance.

(d) *Northern Ireland Finance and other Matters*

(i) "*Tempering the Wind*" of *Statutory Finance*

A full account of the financial relations between Northern Ireland and the British Government would require a volume to itself. But the broad lines of treatment can be established beyond controversy. And the main results tell their own tale.

The final ratification of the Treaty in December, 1922, brought Northern Ireland face to face with the choice whether to accept its place, preserving its own limited autonomy, in the Irish Free State or whether it would "contract out" and remain a part of the United Kingdom. In the latter event it would, in Mr. Lloyd George's phrase, "share the rights and obligations of Great Britain." Those obligations were substantial. Northern Ireland would have to contribute to Imperial liabilities and expenditure.

The scale and method of contribution were laid down in the Government of Ireland Act, 1920, as adjusted by

the Consequential Provisions Act, 1922, which was passed on the same day as the Constitution Act. The bulk (some ten-elevenths) of Northern Ireland revenue would be collected by the British authorities and paid over to the Belfast Government after deduction of:

- (a) the amount of the Northern Ireland contribution to Imperial liabilities and expenditure:
- (b) the cost of such administrative services in Northern Ireland as were retained in British hands (cf: Sec. 24, Government of Ireland Act, 1920).

The amount of the contribution was to be a proportion of the previous year's Imperial liabilities and expenditure; and "the proportion of Imperial liabilities and expenditure so to be contributed shall be such as the Joint Exchequer Board may, having regard to the relative taxable capacities" of Northern Ireland and the United Kingdom "determine to be just"—subject to revision at five year intervals. Thus the first charge on (or deduction from) Northern Ireland's revenue was to be the Imperial contribution assessed by reference to the relative taxable capacities of the two contributing units. And the first year's contribution had already been fixed provisionally at £7,920,000 (cf. Sec. 23 (4) Government of Ireland Act, 1920).

Reference has already been made to the political influences that were brought to bear on the Treaty settlement from November, 1922, onwards. They bore fruit. The Chancellor of the Exchequer took immediate action. A Treasury Minute of 15th January, 1923, records:—

"The Chancellor of the Exchequer states to the Board that, after consultation with the Prime Minister of Northern Ireland, he purposes that a Committee shall be appointed to consider whether, in view of the ratification of the constitution of the Irish Free State, any alteration is needed in the present scale of the contribution of Northern Ireland to the cost of Imperial Services.

"The Committee will be composed as follows:—

The Lord Colwyn (Chairman)

The Rt. Hon. Sir Laming Worthington-Evans,
Bart., M.P.

Sir Josiah Stamp, K.B.E., with

Mr. William Piercy, C.B.E., as *Secretary*.

"My Lords approve."

The Final Report of this Committee bears date 2nd March, 1925. Its first Report, dated 14th September, 1923, describes the functions entrusted to it:—

"2. It was agreed in correspondence which took place between the Chancellor of the Exchequer and the Prime Minister of Northern Ireland between the 22nd November, 1922, and the 12th December, 1922, that these terms should be deemed to be wide enough to include the discussion of certain financial matters which were put forward by the Government of Northern Ireland in connection with the question of the contribution in a letter from the Prime Minister of Northern Ireland to the Colonial Secretary dated 6th November, 1922. We have accordingly examined such of these matters as were placed before us, and made recommendations for their adjustment. In the case of the contribution we have, in view of the broad interpretation to be put on the terms of reference, not attempted to distinguish, in making our recommendations, between alterations having reference to the ratification of the Free State Constitution and an equitable adjustment based on the charges which have taken place in receipts and expenditure, the level of prices and other factors since the figure mentioned in Section 23 of the Government of Ireland Act, 1920, was arrived at." (First Report of the Northern Ireland Special Arbitration Committee, 1924, Cmd. 2072.)

The Final Report is even more specific:

"2. Our terms of reference as defined extended or limited by the correspondence between the Chancellor of the

Exchequer and the Prime Minister of Northern Ireland between the 22nd November, 1922, and the 12th December, 1922, impose on us the task of laying down a principle for determining or altering the present scale of the contribution of Northern Ireland to the cost of Imperial Services, for application by the Joint Exchequer Board for the year 1924-25 and following years," (1928: Cmd. 2389, para. 2).

Both Reports repay study, for they have all the quality to be expected from the distinguished ability and financial experience of the members of the Committee.

There can be little doubt, however, that the recommendations of the Committee did some violence to the statutory provisions governing the case. For they ignored the statutory requirement of a first charge on Northern Ireland revenue to defray a fixed proportion of the previous year's Imperial expenditure. They substituted the quite different idea that Northern Ireland should contribute such surplus of revenue as might remain after satisfying the requirements of the local administration. Doubtless this was in accordance with the Committee's understanding of its terms of reference:—the responsibility if administrative action inconsistent with the law followed would lie elsewhere. It is noteworthy that the land purchase annuities were to be excluded from the revenue side of the account for the purposes of this calculation. There are, of course, reservations to prevent undue inflations of local expenditure and an elaborate formula is provided, for the Joint Exchequer Board, for regulating the basis on which the account is to be taken. But the broad and outstanding result of the Committee's labours was that the Imperial contribution is robbed of its pride of place as the first charge on Northern Ireland revenue as collected by Britain and that local expenditure reigns in its stead. The Imperial Contribution becomes a contingent residue whose ascertainment depends upon the detailed application of a formula so complex

as to defy the scrutiny of publicist, journalist, legislator or economist-statistician who has not access to unpublished Treasury figures.

Certain points from the Report are of interest for present purposes.

The Committee adverted to, but could not adopt, "the view that taxation common to both Great Britain and Ireland is in itself to a certain extent a measure of relative gross taxable capacity." For the standard year of which the Report treats the respective standard figures are given in a Schedule.

Reserved Revenue

Northern Ireland £10,084, 430. Britain £652,750,642.

Imperial Expenditure

£583,500,000.

Local Expenditure

Northern Ireland £4 19s. 9d. per head

Britain £3 18s. 5.97d. per head

It is to be observed:

- (a) that the ratio of reserved revenue as between the two contributors is as 1 to 65.
- (b) that one sixty-sixth part of Imperial expenditure would be some £8,800,000, and
- (c) that Northern Ireland is allowed a considerably higher rate of local expenditure than Britain in addition to the abatement on the revenue side in respect of the land purchase annuities, thus curtailing its available surplus in both directions.

Thus was effected, most skilfully, a fundamental modification of the financial position of Northern Ireland under the Government of Ireland Act, 1920, without altering that Statute. The inevitable was successfully avoided. "Inevitable," the Prime Minister had written (10th November,

1921) in the pre-Treaty negotiations, "if Northern Ireland were to remain a part of the United Kingdom for Belfast to bear the same burden as Liverpool, Glasgow or London." Belfast was now seen to be on the way to receiving Benjamin's portion. Depressed areas in Britain might languish into decay for want of financial aid from the British Exchequer. But in spite of Treasury remonstrances the ear of British Chancellors of the Exchequer was always favourably inclined to the self-governing Belfast. The Northern Ireland Government obtained lavish British subsidies from time to time which largely off-set such Imperial contribution as was payable. The figures tell their own tale. And the figures so far as procurable from official sources are to be seen in special tables on pages 286-295 prepared for the author by the Intelligence Branch of *The Economist* newspaper.

An expensive local administration in Northern Ireland is maintained at the cost of the Imperial Exchequer, which refrains from taking its appointed revenue. Northern Ireland, in effect, has representation without taxation. And Parliament at Westminster suffers itself to be precluded from scrutinising or controlling or even discussing the application of the monies which it provides or the nature of the general administration which its subsidies support. That is the broad effect of the story told by the figures.

(ii) *The Council of Ireland*

Another matter was bearing heavily on Northern Ireland in 1922-23. How was it going to be affected by the Council of Ireland?

The Council of Ireland bulked largely in the Government of Ireland Act, 1920, which created the subordinate parliaments of Southern and Northern Ireland with strictly limited powers. The Council of Ireland was to be the symbol of Irish unity, a unifying factor and the organ which, by agreement, should develop into a parliament for

all-Ireland with considerably extended powers. It was to possess certain powers forthwith in regard to matters of common interest, such as railway affairs, diseases of animals, fisheries and so on, and it was to be the channel through which further powers, such as control of fiscal policy, might be delegated to Ireland. The Act of 1920 envisaged a coming "day of Irish union" when by identical acts of the two parliaments the national integrity of Ireland should be restored and the new partition abolished. And the Act, in addition to prescribing the immediate constitution and powers of the Council of Ireland, also contained provisions for what should happen when "the day of Irish union" arrived. There was to be an Irish Exchequer and an Irish Consolidated Fund into which Irish revenue and, in particular, the land purchase annuities, were to be paid—unless the identical acts of the subordinate parliaments directed otherwise. Irish union, so to be achieved, was to depend upon no further British legislation but solely upon the two Irish parliaments.

The Treaty expressly preserved the Council of Ireland. It provided by Article XII that Northern Ireland might "contract out" of the new Irish Free State and that, if it did, "the provisions of the Government of Ireland Act, 1920 (including those relating to the Council of Ireland), shall so far as they relate to Northern Ireland continue to be of full force and effect. . . ." And by Article XIII it provided that, in that event, "the powers of the Parliament of Southern Ireland under the Government of Ireland Act, 1920, to elect members to the Council of Ireland shall after the Parliament of the Irish Free State is constituted be exercised by that Parliament." It is thus seen that the policy of the Treaty was that Northern Ireland could retain, if it wished, its existing partitioned Parliament but that the Council of Ireland and its machinery should still remain to act as a current link with Southern Ireland and as a factor tending towards ultimate unification.

Thus, in 1922-23, if Northern Ireland was "to contract out" the position was that the Council of Ireland, with half its members representing the Irish Free State, would have certain powers in Northern Ireland but none in the Irish Free State, and that its existence would be a bar to Northern Ireland getting any further powers of self-government direct from Westminster. This was a position extremely repugnant to the Northern Ireland leaders and their Die-Hard Conservative friends. In the end, as the result of pressures and bargainings, the Consequential Provisions Act, 1922, which accompanied the Constitution Act—the ratification Act—contained an agreed clause in its First Schedule by which power was given to the two Parliaments by identical acts to alter the constitution of the Council of Ireland and by which the transfer to the Council of Ireland of its powers was to be deferred until such identical legislation should be enacted or for a period of five years "whichever first may happen."

But the concession, obtained by Northern Ireland, was only, if no agreement came, a postponement of the evil day. The next few pages will show how the difficulty was surmounted.

(iii) *The Boundary: An Amending Treaty*

Equally urgent for the Northern Ireland leaders was the question of the boundary. If Northern Ireland were to "contract out," then there was to be a Boundary Commission to "determine in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions, the boundaries between Northern Ireland and the rest of Ireland." An immensity of controversy centred on this topic from the outset.

The nature of the arrangement was quite clear in its historical aspect. The Irish minority resisting Home Rule had claimed to be excluded from the rest of Ireland if Home

Rule was to be granted. Exclusion of the small minority—less than ten per cent—scattered through the south and west was plainly impossible. But it was contended that Ulster demanded—and ought to be granted—exclusion. When, however, in the pre-war days, the subject was put in issue, close investigation showed that Ulster was by no means homogeneous, and although the organised resistance claimed to speak for a united province, the Ulster negotiators tacitly abandoned three out of the nine counties and concentrated on the remaining six. These earlier negotiations broke down—in their concluding stage at the Buckingham Palace Conference in 1914—because neither side would yield in regard to two of the remaining six counties, Tyrone and Fermanagh, in which the Nationalists claimed a majority and which were, in fact, represented in the United Kingdom Parliament by Nationalist members. There would be no reason or fairness, the Nationalists urged, in excluding predominantly Nationalist areas from Nationalist Ireland when carving out a special anti-Nationalist area for the protection of the anti-Nationalist minority. To do so would be to create, so it was urged, yet another minority, equally demanding protection, a minority of expatriated Nationalists handed over to the anti-Nationalists. On the other side, the Ulster Party contended that the areas in question were economically and administratively indispensable to the truncated province for which exclusion was sought. Proposals were discussed which aimed at a division of the disputed area by allotting to either side particular administrative units, such as parishes, townlands, baronies or poor law unions, according to their respective political sympathies. Nothing, however, came of these proposals.

When Northern Ireland came to be created in 1920, Nationalist Ireland, being engaged in war with Britain, was unrepresented at Westminster. The anti-Nationalists were in a position to get whatever area they wanted. Sir

James Craig frankly stated that they could not take the whole of Ulster because they would not have a secure majority. Accordingly, they took the six counties in which they represented about two-thirds of the population.

A year later came the Treaty and the establishment of the Irish Free State. In sending it to Sir James Craig, Mr. Lloyd George sketched the two alternatives which it offered to Northern Ireland, i.e., inclusion in the Irish Free State whilst retaining all its existing powers, and exclusion, also retaining all its existing powers, but sharing the rights and obligations of the United Kingdom; "In the latter case, however, we should feel," wrote Mr. Lloyd George, "unable to defend the existing boundary. . . ." (Letter 5th December, 1921. Cmd. 1561.)

Soon afterwards it transpired that the Irish Free State leaders and the Northern Ireland leaders had quite different views as to what the Boundary Commission provision in the Treaty meant. It became known that Mr. Michael Collins and Sir James Craig each believed himself to have received assurances from Mr. Lloyd George, the one that substantial areas would be transferred to the Free State and the other that nothing more than minor rectifications of the boundary were contemplated. Numerous debates in both Houses of Parliament at Westminster turned on the issue thus posed. The British Government refused all amendments proposed for the purpose of safeguarding the position of Northern Ireland and maintained that everything lay with the Boundary Commission. As time went on a clamour of authoritative voices grew, saying that Article XII meant, what it ought to mean, what it must mean to anyone with a scintilla of legal training or competence. A letter from Lord Birkenhead to Lord Balfour was widely referred to as determining the issue in the narrower sense. And signatories (on the British side) of the Treaty protested that they would not have signed unless the narrower interpretation was meant. In short, after the

Northern Ireland advocates had exhausted all their efforts to get the Article amended on the ground that it was obviously most unfavourable to the interests of Northern Ireland, the swelling chorus of eminent voices, Ministers, ex-Ministers, judicial personages, great lawyers and laymen, that proclaimed the narrower interpretation, created an impression which it would have been extremely embarrassing for any publicist within the ambit of their influence to disregard. At the very last President Cosgrave was moved to protest:—

“ . . . The gravest apprehension is felt in Ireland regarding the manner in which Clause 12 of the Treaty has been canvassed. Since February last it would appear as if the terms of the clause, viz: the wishes of the inhabitants, were to be subordinated to whims of persons in positions of authority and power. Further examination and approaches towards possible agreement in these circumstances would, of necessity, imply that the rights guaranteed by this Article are in jeopardy, and I have never had any authority to agree to any abrogation of the rights of the inhabitants as defined in the Article”
4th June, 1924. (President Cosgrave to the Prime Minister. Cmd. 2166.)

The result, however, disappointed every one of the strenuous and differing expectations.

It had been observed in the course of the debates that much would turn upon the personnel of the Commission. Much, indeed, was found to turn upon it. The Chairman selected by the British Government was Mr. Justice Feetham, a South African lawyer, who is understood to have done good service to the British Empire in regard to Indian, Chinese and African affairs both before and also after the Boundary Commission. As between Professor McNeill who represented the Irish Free State and Mr. Fisher, who, on the refusal of the Northern Ireland Government to take any part in the proceedings, had been appointed by the

British Government to represent Northern Ireland interests, he may be assumed to have determined the attitude of the Commission. It was at any rate he who wrote a very able and detailed account—omitting the conclusions arrived at—of the basis in reason and opinion upon which the Commission approached their subject.

Mr. Justice Feetham's Report (and award) were never published. It would appear to have been a dynamic document. Before it was completed Professor McNeill resigned. Journalistic enterprise, claiming authentic inspiration, forecast a substantial transfer of Irish Free State territory to Northern Ireland. The story was, of course, declared to be unauthorised and inaccurate. But Dublin was panic-stricken and Belfast proportionately elated. A strange thing had occurred which was beyond the imaginative range of both skilled observers and ardent partisans. A new meaning was given to the old tag: "*ex Africa semper aliquid novi.*" By one of those inexplicable coincidences which remain the marvel of the ages the South African judge happened to be the one individual whom his own trained judgment and personal idiosyncracies could constrain to adopt a view beyond the pale of all the views hitherto expressed by anybody on any side. For there is no doubt that the "unauthorised and inaccurate" forecast had had a substantial substratum of truth and that it had been founded on the premature jubilation of a partisan who had somehow got wind of what was in preparation.

An element of breathless precipitation complicated matters. It was stated and accepted as correct that the publication of the Boundary Commission's award—which was now ready—would automatically render it legally and administratively operative. This view which was laid down by the British law officers rested on the conception that Article XII of the Treaty operated as statute law and not as an international agreement, for in the latter event an award involving the transfer of territory from one

country to another would require formal and agreed steps in the administrative sphere to implement it. No one appeared to realise that if this were so and if, being so, were inconvenient, it could be remedied very simply by agreement between the parties whose Treaty had brought the Commission into existence. In the flutter of the resultant crisis the legalistic view was allowed to pass without challenge—even though the difficulty so created at once thrust the matter back into negotiations for an amendment of the Treaty by an instrument cast in Treaty form. A sword of Damocles was, therefore, seen to be suspended over the head of the Free State, and it lay with Mr. Justice Feetham and his Northern Ireland colleague Mr. Fisher to sever the single hair that upheld it whenever they willed. Negotiations between Mr. Cosgrave and the British Government were enlarged by the summoning of the Prime Minister of Northern Ireland who, having from the outset repudiated the Commission and all its works, now found in them a beneficent result beyond his dreams. His concurrence, which the British Government had dispensed with for the Treaty of 1921, was now insisted upon for the amending Treaty of 1925. Urgent solicitations were addressed to Mr. Justice Feetham by a deputation of the three Prime Ministers to invite him to defer the fall of the sword of Damocles for a brief space whilst they conferred. His magnanimity and self-sacrifice in assenting were lauded to the skies.

To such a negotiation there could be but one result. Sir James Craig held all the cards—and particularly the joker supplied by Mr. Justice Feetham. The Council of Ireland was swept away. The existing Boundary was to remain unaltered and the Feetham award was to be relegated to limbo. Great Britain contributed to Sir James Craig's triumph by financial concessions not included in the formal agreement but described by Mr. Winston Churchill, the Chancellor of the Exchequer, in the debate

on the bill confirming it. These concessions comprised the remission of a sum of £700,000 due by Northern Ireland to Great Britain in respect of equipment and stores furnished by Great Britain and a further subsidy of £1,200,000 towards the cost of the Northern Ireland Special Constabulary. The effect of the Articles relating to the Anglo-Irish financial affairs will be described in a subsequent section. In form they extinguished the contingent and indeterminate Irish liability under Article V of the Treaty and substituted an immediate obligation to pay some £6,000,000.

The Agreement¹ that embodied these terms was executed by delegations of Ministers of Great Britain, of the Irish Free State and of Northern Ireland, who signed, in express terms, on behalf of their respective governments; and it was confirmed—a few days later—by the British Parliament and the Oireachtas of the Irish Free State as required by its concluding Article. As it was an instrument “amending and supplementing”—in the words of its title, the original Treaty, it was executed and was accorded statutory ratification or confirmation with the same formalism and precision as had been adopted in the case of the Treaty.

The negotiations, from President Cosgrave’s first visit to London after the journalistic disclosure of what was brewing to the execution of the agreement, occupied just five days. The sword of Damocles conduced to a promptitude that resembled precipitancy and some things at least, as will be seen, were decided without previous preparation and with very little discussion. The statutory ratification took seven days more.

(iv) A Disclosure during the Boundary Settlement

A bright light was shed upon the closely allied topics of the Boundary and of Northern Ireland’s financial contribution to Imperial expenditure by the speeches of the

¹ For the text of this Agreement see Appendix, pp. 347-9.

British Prime Minister and the Chancellor of the Exchequer in the debate on the Agreement.

It will be recalled that the Northern Ireland Government—a subordinate government with limited powers representing an electorate which had also parliamentary representation in the Westminster Parliament—had refused to take any part in, or to be bound by, the arbitration proceedings provided by Article XII to which that Government owed its continued existence. It had announced that it would not surrender an inch of territory.

It is necessary to be specific. In 1923—the year in which most of these things took shape—Sir James Craig, Prime Minister of Northern Ireland, said in the Belfast Parliament:—

“He was glad to be able to reassure them that, not only so far as he and his colleagues were concerned, but so far as that House was concerned, they were unchanged and unchangeable in their views as to the Border question. The British Government had agreed to give a further £1,000,000 towards the cost of the Special Constabulary for the forthcoming year. He thought that would satisfy everyone that the force would be able to meet anything that it could possibly be called upon to perform.” (*The Times*, 17th October, 1923, p. 12, Col 5.)

A year later, at the opening of the Belfast Parliament, he was more explicit:—

“Against this manner of dealing with the territory of Ulster¹ we say ‘Stop.’” He added: “We say that it must stop and we say emphatically ‘Stop now.’ . . . If the decision of the Commission is such as cannot be accepted by the Parliament of Northern Ireland, I, for my part, would not hesitate for a moment. . . . I would then resign and place myself at the disposal of the people, no

¹ It is to be observed that neither Sir James Craig nor the Belfast Parliament were, in strict accuracy, entitled to speak for Ulster, since three of its nine counties had been, without contention or constraint, included in the Irish Free State.

longer as Prime Minister but as their chosen leader to defend territory which we may consider has been unfairly transferred from under Ulster, Great Britain and the flag of the Empire. That will be my duty, and that duty will be faithfully performed. This is the policy of a unanimous Cabinet." (*The Times*, 8th October, 1924, p. 16, Col. 3.)

Five months later Sir James Craig, seeking an express mandate from the electorate, dissolved the Belfast Parliament. One exhortation in his election address was as follows:—

"Rally round, true and tried champions of the old cause! Save Derry, Tyrone and Fermanagh and the Border and enable me to stand firm with a united loyal Ulster behind me, to combat the forces of dismemberment, disruption and disorder." (*The Times*, 16th March, 1925, p. 14, Col. 5.)

By the Boundary provisions of Article XII, Mr. Baldwin told the House of Commons, "the expectations of the Free State were aroused no less than the apprehensions of the North, and he went on:—

"It resulted in the maintenance in the North of that large force of Special Constables which was, in itself, a charge, and to which the Government of this country felt that it owed a duty to subscribe." (Hansard, 8th December, 1925, Col. 310.)

Mr. Winston Churchill was even more explicit:

"While the Boundary question was in suspense, Sir James Craig and his Government felt it necessary to maintain between 30,000 and 40,000 armed Special Constables in various degrees of mobilisation. Every year, to every Government, they were bound to make their request for financial assistance. On the basis of there being no settlement, they were proposing to me, in the discussions which naturally take place at the Treasury, that we should provide for the maintenance of all the

Special Constables in their present state of efficiency up to at least September, 1926, and they were pressing for a sum of £2,250,000 on that account." (Hansard, 8th December, 1925, Col. 361.)

Now, however, in view of the Boundary Settlement, the Special Constabulary was going to be wound up and he was going to make one final payment for that purpose of £1,200,000. The general financial effect of the Imperial subsidies to Northern Ireland was further brought out when Mr. Churchill corrected a statement that "Ulster" had already paid £18,000,000 by way of Imperial contribution. "On balance the sum," said Mr. Churchill, "is not much over one million a year." Northern Ireland had at that date been in existence for four years and four months.

It is to be observed that both Sir James Craig and the British Government (through the mouth of its Prime Minister) confessed to being moved by the impulsion of duty in these matters. It is surely regrettable that where this duty was in apparent conflict with the primary obligations of His Majesty's Ministers to maintain the law and constitution within the realm and its plighted word in external matters, no faintest indication was vouchsafed as to the nature of these overriding obligations or the persons or forces that were entitled to exact their fulfilment.

No one discussed these extremely interesting statements which were volunteered, without question asked, in the course of explaining the agreement and the accompanying transactions. No one thought to ask what this great force of "armed Special Constables in various degrees of mobilisation" was prepared for. It can only be inferred that everybody at Westminster knew—or perhaps indeed that nobody at Westminster cared. But if the words used hold their accustomed meanings and if facts in these Anglo-Northern Ireland dealings are as facts in the larger world, then Northern Ireland had been preparing to resist by force of

arms the execution of the Treaty in regard to the boundary—in case that execution of the Treaty should take a form which it disliked. And the British Government had provided the money to enable that resistance to the Treaty to be organised upon a most extensive and elaborate scale. That is the plain fact.

The plain fact needs no embroidery of comment. But it may be well to supplement it by the statement of certain relevant facts.

The Treaty, as a treaty, bound Northern Ireland just as it bound the United Kingdom of which it was, and remained, a subordinate province. In this view the British Government had been providing the sinews of war to prepare—contingently—for a forcible violation of the Treaty by a province under its control and to the detriment of the country to which Britain was bound in virtue of the Treaty by obligations of express contract and implicit good faith. That is the one aspect—on the basis that the Treaty was a treaty. The alternative aspect is on the basis, provided by the British legalists, that the Treaty was no more than a constitutional settlement and from December, 1922, onwards, was no more and no less than a British law. In this aspect the British Government was violating no Treaty. It was only subsidising one subordinate province to offer armed resistance to the law of the land—its own Imperial law—to the detriment of another province that desired, and was entitled to, the operation of that law. In this view the Irish Free State, having neither treaty rights, nor legal remedy, nor representation at Westminster, had no means of effective protest. So much the worse for the Free State! In this view also the affair followed directly in line from the precedent of 1911-14—with little difference save advantageous difference. In 1911-14 the British Die-Hard Conservatives—the official Opposition Party—assisted the Ulster party to organise armed resistance to a projected British statute inaugurating constitutional changes. In 1923-25

the same party, now in full control of the British Government, assisted the Ulster Party to organise armed resistance to the contemplated result of an existing British statute inaugurating constitutional changes—but, more fortunately situated in the later than in the earlier period, they were now able to finance the armed resistance out of the British Exchequer in ease of their party funds and their partisans' pockets. If the authority of the law suffered, if respect for law were undermined, if good faith were sacrificed, what matter so long as Imperial interests, as they conceived them to be, were served?

A final consideration. The words of Mr. Baldwin and Mr. Churchill indicate that it was not for police purposes that the armed Special Constabulary were organised. Police requirements in Northern Ireland were, and are, met by the Royal Ulster Constabulary with the military forces of the Crown in the background to give support if required. The Special Constabulary owed their existence to the uncertainty about the boundary and were due for disbandment once that uncertainty was removed. They were not all got rid of apparently, and the cost of the police service in Northern Ireland remains disproportionately high. But that is a consequence of keeping inside the artificial Northern Ireland border populations of Irish Nationalists within sight of their promised land, but held in subjection, with restricted civil rights, and with something very like effective disfranchisement in regard to parliamentary and local government.

How are these things expected to present themselves to Irish minds in the Irish Free State when, the legalistic position having been annihilated by the Statute of Westminster, they are adjured in the name of honourable obligations imposed by the Treaty to accept the legalistic conception of what the Treaty meant?

What, in the light of these things, is to be thought of the oft-repeated asseverations of Lord Hailsham and other

British spokesmen that Britain has always observed the Treaty "in the letter and in the spirit?"

The Boundary Agreement of December, 1925, however it came about, stands. It was properly executed and ratified by the parliaments concerned. There is no argument about that. But the position of the unredeemed Nationalist minority in Northern Ireland endures to trouble the visions of the earnest peacemakers who seek that lasting Anglo-Irish reconciliation which the world situation demands with such cogent and importunate reasoning.

(e) *Anglo-Irish Financial Relations.*

Was there an Ultimate Financial Settlement?

In sharp contrast to the Boundary Agreement of 3rd December, 1925, is the disputed document of 19th March, 1926, relating to the Ultimate Financial Settlement.

The former was a completed and ratified instrument of international contract comparable to the Treaty which it supplemented and amended. The latter, on its face and in virtue of its form, positively obtrudes doubts as to whether it was even intended to operate as an international instrument. And it was certainly never submitted to the Irish Oireachtas for approval or ratification. Yet the two subject matters treated in these two documents were the two big important problems—the Northern Ireland Boundary, under Article XII, and Anglo-Irish Financial Relations, under Article V—left over by the Treaty for subsequent treatment by agreement and, if necessary, by arbitrations. To what end—for what intelligible purpose—could so different a method have been adopted in these two parallel cases if, in each a comparable degree of agreement had been attained and if an equally binding engagement was desired? The disputed document¹ is claimed to have been "The Ultimate Financial Settlement" requisite under Article V and otherwise of the Treaty. Is it customary—

¹ For the text of this document see Appendix pp. 350-1.

is it convenient, either in internal administration or in international relations, for detailed and difficult matters of finance to be dealt with in so slipshod and haphazard a fashion?

It is necessary to dispose of the question of form before proceeding to the large questions of substance that lie behind.

(i) *Form. Was there a Binding Agreement?*

In the early days of the controversy, in 1932, the British spokesmen were Lord Hailsham, the Minister for War and leader for the Government in the House of Lords, and Mr. J. H. Thomas, Secretary of State for Dominion Affairs.

The former said:—

“Basing ourselves on the view . . . that the 1926 Agreement was intended, and stated in terms, to be the Ultimate Financial Settlement . . .” (Hansard, 10th October, 1932, Col. 800).

The latter stated that the disputed document:—

“ . . . was signed on behalf of the British Government and on behalf of the Government of the Irish Free State.” (*Despatch*, 9th April, 1932, Cmd. 4056.)

Neither statement can be accepted as true. No one is concerned for a moment to suggest that these distinguished Ministers had any intention to mislead. But in putting forward pleas of fact, that is, not the facts themselves but the construction which, in their contention, should be put upon the facts themselves, their words were apt to mislead unless and until the actual document was examined.

In the raging and tearing publicity campaign which ensued and in which the face of Ireland was blackened before the whole world as a defaulter and a country that repudiated the most binding of legal and honourable obligations, such statements as the foregoing were widely quoted and misunderstood. And even to-day, when it is

generally recognised that there is a crippling infirmity in the British case, the truth of the matter has scarcely yet caught up with the original misconceptions.

On the face of the document it was what it professed to be:

“Heads of the Ultimate Financial Settlement Between the British Government and the Government of the Irish Free State.”

and not the Ultimate Financial Settlement itself. For the Ultimate Financial Settlement to be operative in the administrative sphere and binding in the international sphere, it would require, as indeed the sequel proves, to be worked out in more elaborate form. It would require also to be framed as an Agreement for representative signature and parliamentary confirmation. The disputed document consists of twelve numbered paragraphs dealing with twelve different subjects. “The British Government agree to” this and “the Irish Free State Government agrees to” that, and the twelfth paragraph provides that “this Agreement shall be deemed to be the Ultimate Financial Settlement. . . .” No mention is made of parliamentary confirmation which would be a natural and necessary feature of the Agreement when prepared for formal execution. It was, in fact, the Heads of an Agreement to be made, which Agreement, when made, was to be the Ultimate Financial Settlement, but it was not the Ultimate Financial Settlement itself.

This *prima facie* view of the document is supported by various other considerations of compelling quality.

The document was signed by Mr. Blythe and Mr. Winston Churchill, who are not shewn upon its face as signing in any particular capacity nor on behalf of anybody or anything. They were, in fact, the Irish Free State Minister of Finance and the British Chancellor of the Exchequer. The two Finance Ministers would seem—on the face of

the transaction—to have agreed upon the main elements of a financial settlement which they were agreeing to recommend to their respective Governments with a view to its embodiment in treaty form. Finance Ministers do not normally execute international treaties; and if and where such a thing were contemplated, a good deal would have to appear on the face of the instrument to explain their credentials or authority and to show that they were putting themselves forward as signing in their representative capacity and “on behalf of” the country which their signature was to bind, and subject to parliamentary confirmation.

At the foot of the Boundary Agreement were the words: “Signed on behalf of the British Government,” followed by the names of the Prime Minister and of four Cabinet Ministers, and “Signed on behalf of the Government of the Irish Free State,” followed by the names of President Cosgrave and two members of the Executive Council. Why, then, four months later, if the disputed document was intended to be the Ultimate Financial Settlement, was it accorded such maimed and curtailed rites by comparison with the Boundary Agreement? How, particularly, in the eyes of the legalists, could the necessity for parliamentary sanction have been deliberately neglected, seeing that it was accepted law, resting on Privy Council decisions, that no obligation purporting to bind a Dominion to pay an annual sum of money is legally binding unless it has been submitted to and confirmed by the Parliament of the Dominion? How, in any case, could the departure be explained or justified which thus abandoned the usual practice, usual both before and after this case, of casting in treaty form such agreements as were needed for dealing with matters in supplement or modification of the Treaty?

No effective answer has been given to such questions as these. It would appear that no answers can be given. The disputed document has been left to general criticism without other support than the statement that so long as

President Cosgrave remained in office the payments which it prescribed were annually made to Britain. To that, of course, the Irish answer would be that the position had been irregular, that the Oireachtas had not been fully informed and could not be held to be bound by an instrument which had not been formally submitted to it and approved by it.

Striking support for the Irish view that the disputed document was no more than a memorandum, agreed as between the appropriate departmental chiefs on either side, of what, if approved by the respective Governments, was to be embodied in a formal agreement prepared for representative execution and confirmation is to be found in the record of what ensued.

Thus, the fourth "Head of Agreement" in the disputed document, which was one for the avoidance of double income tax, was immediately worked out in an appropriate agreement on normal lines. Within less than a month after the signature of the disputed document or, to be exact, on 14th April, 1926, a formal Agreement for the avoidance of double income tax was drawn up and executed by Mr. Winston Churchill and Mr. Blythe, signing in their respective representative capacities as British Chancellor of the Exchequer and Irish Free State Minister of Finance. This Agreement, which contains no reference to the alleged agreement which is in dispute, by Article 8 provided that it was to be "subject to confirmation by the British Parliament and by the Oireachtas of the Irish Free State and shall have effect only if and so long as legislation confirming the Agreement is in force. . . ." This Agreement was expressly confirmed by Sec. 23 (1) of the British Finance Act, 1926, and was embodied in the Second Schedule to that Act.

This would appear to be conclusive. But later the British view of the disputed document would appear to have been modified as the result of considerations of administrative convenience.

The fifth "Head of Agreement" related to the proposed payment by the Irish Free State of a twenty-year annuity of £600,000 in respect of Local Loans Fund advances—a yearly amount which, owing to certain modifications, would not exactly correspond with the Treasury figures in London. Accordingly the matter was dealt with in the Public Works Loans Act, 1927, by Section 4. Here, after recitals¹ as to the Irish liability to make the payment and as to "an agreement made the 19th day of March 1926," which provided for that liability being discharged by a twenty-year annuity of £600,000, Section 4 proceeds in the somewhat remarkable terms: "Now, therefore, notwithstanding anything in any enactment, the said Agreement is hereby confirmed" and continues with three sections providing for the acceptance of the annuity and certain resultant adjustments of account.

Now a good deal of comment, one way and the other, might be occasioned by this transaction and the obscurity which envelopes it. But for the present purpose it suffices to stress it as showing that the British Parliament recognised the necessity for statutory confirmation of any agreement as to Anglo-Irish finance if, and in so far as, it was to operate as an international agreement or in the administrative sphere. And it is the common case that the Oireachtas never accorded statutory confirmation to the disputed document. And, furthermore, the British Government can have been under no misconception as to the possibility of obtaining such ratification from the Oireachtas. The Irish Minister of Finance has of recent years published extracts from official correspondence with British Ministers

¹ These recitals, in dealing with the recited document, contain no reference to any Ultimate Financial Settlement. Nor do they allude to any matters dealt with in the disputed document other than the Local Loans Fund advances. Nor is the recited agreement embodied in a Schedule to show the text of the provisions which are being accorded statutory confirmation.

There is consequently a doubt whether the instrument so confirmed was the disputed document or whether it was an inter-departmental accord of the same date dealing only with the one [topic as recited and prepared for the purpose of giving effect to Head Five of the disputed document.

or their departments in 1926, showing that the Irish Government was reluctant that what had been done should become known to the Oireachtas and the Irish public. And it is established that whilst the disputed document remained unpublished for some eight months after it was signed another "financial agreement" upon which the British claim was equally based remained wholly undisclosed from February, 1923, until, in 1932, the controversy between the two Governments had been opened in formal despatches.

(ii) *Substance : Errors, Omissions and Inconsistencies*

Now it is extremely difficult to portray the financial controversy upon the "bird's eye view" scale. There are numerous ramifications of the respective arguments and the British position has undergone some readjustments since its first statement by Mr. J. H. Thomas and Lord Hailsham in 1932. But the broad lines are as follows:—

The main item in dispute is the Land Purchase Annuities. The Board of Works (or Local Loans Fund) loans, referred to in the preceding pages, form a subsidiary item to which some but not all of the same considerations apply. Together they formed the bulk of the moneys in dispute.

The foundation of an Ultimate Financial Settlement lies, firstly, in Ireland's taking over the whole of the Irish revenue and resources with the appropriate liabilities attaching to them, and, secondly, in Ireland's undertaking (Article V of the Treaty) a proportionate share of the liability for the Public Debt and of War Pensions at their then level, but subject to her rights of set-off and counter-claim. Obviously when the Irish administration was split off from the British, and when the United Kingdom Exchequer was dissolved into two Exchequers, there would be many accounts to be adjusted quite apart from the major matter, on national account, of Ireland's liability

and counter-claims. Shortly after the Treaty British and Irish Ministers met at the Colonial Office on 24th January, 1922, and agreed upon broad lines of procedure. (Cf. "Heads of Working Arrangements for Implementing the Treaty [Cmd. 1911].)

On the administrative side, Head Ten, "all properties used for the purpose of ordinary civil government . . . and all departmental assets, including special funds . . ." were to be handed over to Ireland in due course. Head Eleven provided that "without prejudice to any claims which may be made in the general financial adjustment under Article V of the Treaty, the liabilities of each department be assumed by the Irish Government together with the assets." So much for local government finance. Further on came the dealings as to public finance and the public debt. Head Forty-two provided that "pending a definite arrangement for capitalisation," the Irish Government would collect and pay over the sums due in respect of the local loans and land purchase annuities and also pay a contribution equal to certain charges on the Consolidated Fund payable by the United Kingdom Exchequer in respect of Ireland, Judges' salaries, pensions to Civil servants and such-like matters. The question of any payment under Article V was deferred (Head Forty-three) pending the subsequent settlement. Head Forty-seven records: "Mr. Collins desired that the further consideration of Land Purchase should be reserved."

The main lines of procedure were clear. There was to be a segregation of the assets and liabilities of the respective partners whose partnership was now terminated. All special questions that arose would be brought together for adjustment in the Ultimate Financial Settlement under Article V. The local government segregation was to proceed forthwith. The national finance segregation stood over (a) for capitalisation as to annual payments to be taken into account, and (b) for the adjustment of liability and

set-off and counter-claim in respect of national finance at large. Head Forty-two makes it clear that it was recognised that the local loans annuities and land purchase annuities were payments in respect of the public debt. They were, in fact, public assets representing the annual return upon governmental investments of public money borrowed on the credit of the Exchequer of the United Kingdom of Great Britain and Ireland—investments made respectively by the Board of Works and the Irish Land Commission by way of loans for the creation of improvements to property or for the purchase by tenants of their holdings. Thus they clearly fall within the scope of Article V of the Treaty both as to the liability and as to the set-off and as to the counter-claim: subject to any special equities or legal rights which on particular grounds could be shown to attach to them on either side of the account.

The bulk of the administrative departments were transferred on the morrow of the confirmation of the Treaty. The confirmation Act received the Royal Assent on 31st March, 1922. On 1st April, 1922, the transfer was effected by Order in Council. The Irish Land Commission was not included in the transfer. The handling of the land purchase annuities, therefore, remained in British control until after the next stage which preceded the transfer of the Irish Land Commission a year later to the Irish Free State.

The next stage was reached in February, 1923, shortly after the final ratification of the Treaty in December, 1922. Mr. Michael Collins and Mr. Arthur Griffith, the two protagonists on behalf of the Treaty in Ireland, had passed from the scene. The protagonists on behalf of the Treaty in England were no longer in control of the British Government.

President Cosgrave, as has been seen, visited London if not with a twofold purpose at least with a twofold result. He signed on 12th February a document entitled, "Financial Agreements between the British Government and the Irish

Free State Government," which was also signed by Major J. W. Hills, who was the Financial Secretary to the Treasury. During his visit he appears to have sought the assistance of the British Government in his struggle against the anti-Treaty party in Ireland. At any rate the British Home Secretary, as has been seen (see page 228 above) arrested and deported to the Irish Free State large numbers of Irish sympathisers, resident in England, of the anti-Treaty party in Ireland; and it was alleged on the British side that this step was taken at the request and in pursuance of oral arrangements with the Irish authorities.

The document of 12th February, 1923, appears to carry forward in logical sequence the arrangement of 24th January, 1922, and to keep open all major issues for treatment in the negotiation of the Ultimate Financial Settlement which is referred to in it at least half a dozen times. It would, therefore, on its face, have determined no issue, by agreement or otherwise, as to the true legal or equitable rights of the two countries respectively as to the land purchase annuities. On its face it was no more than a series of provisional arrangements—an inter-departmental accord—for treating current issues pending and leading up to a final and considered treatment of all major financial issues with a view to a definitive agreement or treaty. Consequently it neither required, or obtained parliamentary confirmation. But here the difficulties begin.

The difficulty which here confronts the dispassionate investigator is that this document was subsequently put forward as the root of Britain's claim to the land purchase annuities. It is the so-called "secret agreement" which figured largely in the controversy. And it certainly was kept secret so far as the Irish Oireachtas and the Irish public were concerned until the opening despatches in the controversy in 1932 revealed its existence to the new Irish Ministers and to the public. But not only was it put forward as determining the ownership of the annuities in

Great Britain's favour by Mr. J. H. Thomas, Secretary of State for Dominion Affairs (Despatch, 9th April, 1932), who claimed that it was "confirmed" by the disputed Blythe-Churchill document of 19th March, 1926, but it was admitted and supported, as having determined the issue, by Irish ex-Ministers, who went even further than Mr. Thomas. For Mr. Blythe, who had been Minister of Finance in 1926, declared that his document of 19th March, 1926, merely affected the matter by providing that the payment of the annuities, as already ordained, to Britain should be made without deduction of income tax.

Next in logical sequence after the Hills-Cosgrave Agreement of February, 1923, comes the amending Treaty of 3rd December, 1925, which dealt with Anglo-Irish finance as well as the boundary. During the interval matters had remained on the same provisional basis as before. No approach had been made towards an Ultimate Financial Settlement—presumably because no definite basis for apportionments existed until the Northern Ireland boundary should be finally settled. The British Government, however, had mentioned a provisional figure for Ireland's liability under Article V of the Treaty. But no figures had yet been put forward in respect of Ireland's set-off or counter-claim. Still less had the underlying principles applicable to the case been discussed or even considered. The very materials for such a discussion do not appear so far to have been prepared. There can be little doubt, therefore, that in so far as the amending Treaty of December, 1925, dealt with Anglo-Irish finance, it did so after an imperfect and inadequate survey of the considerations relevant to the Ultimate Financial Settlement when that should come. And it has been seen that it was negotiated and concluded in an atmosphere of breathless haste.

This amending Treaty with its six Articles must be read as a whole. In "amending and supplementing" the original Treaty it made changes territorial, constitutional and

financial. Concessions in one sphere are balanced against gains in another in a manner unspecified and unidentifiable, so that it is impossible to balance individual items against each other. Northern Ireland emerged, as has been seen, with more than one hundred percent of all it had demanded and with substantial financial benefits added, outside of the Treaty, as a *bonne bouche*. The Irish Free State lost in everything save finance, which was generally supposed to have provided the sugar coating for a revolting dose. There were six Articles in all, of which the last dealt only with parliamentary confirmation. Of the other five, the first crystallised the Irish defeat as to the boundary and the fifth effected an Irish surrender in regard to the Council of Ireland and the hopes which it had held for curing the partition of Ireland. Articles III and IV embodied Irish concessions in money matters to Britain and British protégés in Ireland at a cost described by Mr. Baldwin, the Prime Minister, in the ensuing debate in Parliament as involving some £6,000,000. Article II alone provides any counterweight for these onerous concessions, territorial, constitutional and financial. Article II released the Irish Free State from the liability which Article V of the original Treaty had imposed in respect of the Public Debt and War Pensions of the United Kingdom as they stood at the date of the dissolution of the partnership. There was no corresponding release of Irish claims in respect of the partnership assets or of past over-taxation as established by the great Royal Commission of 1893-96.

The terms thus agreed and confined must speak for themselves. The settlement bore the marks of the precipitate haste in which it was begotten. The subsequent discussions showed that it had suffered from lack of adequate preliminary preparation and discussion. In the five or six days of its incubation President Cosgrave had visited and revisited London. The Irish Minister of Finance only reached London on the day of signature. Is it any wonder

that there were divergences of view as to implications lying behind the written text? But the haste was a haste imposed upon the Irish Free State by "the sword of Damocles" (see page 241 above); and there would seem to be little justice or sense of fair play in seeking to cut down the value of the sole concession which it received as the price of its comprehensive surrender. Mr. Baldwin and President Cosgrave did not describe the financial agreement to their respective parliaments in identical aspects. For while Mr. Baldwin clearly contemplated that the Irish Free State would continue to pay the land purchase annuities and the local loans fund annuities, President Cosgrave impressed upon the Dail his constant aim at a zero figure—"a great big O"—for Ireland's indebtedness to Britain and his success in having achieved it. However this may have been, President Cosgrave was soon afterwards in accord with Mr. Baldwin as to the continuance of these payments. They appear possibly to have considered that as these payments were being lawfully made, no question existed, or could arise, as to the true equitable title to this Irish revenue which was reaching the British Exchequer. And neither seems to have adverted to the need for an ultimate financial settlement to dispose of just such matters as this as well as of all other outstanding financial adjustments. Thus everything necessarily depends upon the terms as signed and confirmed by the respective legislatures. Whatever misconceptions may have clouded the minds of individual negotiators, the statutorily ratified terms are clear beyond all possibility of cavilling. Those terms released Ireland from its "liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions . . ." (Article V of the Treaty) which was the sole liability of the Irish Free State, with its new Exchequer, to the British Exchequer. Were not the land purchase annuities and the Board of Works loans, as paid by Ireland to Britain, payments to the

credit of, in each case respectively, the appropriate account in the British Exchequer, operated by the National Debt Commissioners under the supervision of the Treasury and applied exclusively to the service of the Public Debt? What lawful title could be put forward other than the right prescribed by Article V to warrant a claim that so large a revenue derived from the Irish Free State should be paid into the British Exchequer. Thus whatever claim Britain might previously or otherwise have had to the annuities was expressly destroyed by international agreement confirmed by statute.

It is right to state here that, in the course of subsequent controversy, the British Government committed itself to a contention that:—

“The Irish Land Stocks are not part of the Public Debt or National debt of the United Kingdom. They have never been so shewn in our accounts . . .” (United Kingdom, *Observations on the Irish Free State Memorandum of October 12th, 1932.* Cmd. 4184.)

a contention that must be regarded as a plea of law rather than a statement of fact, since reference to the relevant enactments and public accounts will amply prove (*a*) that the principal denominations of Irish Land Stocks were constituted part of the National Debt and brought within the provisions of the National Debt Act, 1870, by the express terms of the Statutes under which they were created, and (*b*) that for many years they regularly figured as liabilities in the Annual Returns of the National Debt Commissioners and, down to and including the latest issue, have been described by name, under the heading “National Debt Services” in the Finance Accounts of the United Kingdom as forming portion of “the Unredeemed Public Debt.”

The case of the British Government, as made in the above-mentioned document, was perhaps on less perilous ground when it claimed:—

“Apart from these technical considerations, it is perfectly clear that, when the Agreement of 1925 was signed, by which the Irish Free State was absolved from bearing any share of the Public Debt of the United Kingdom, neither party intended to include in this term the land annuities.”

But here the impediment to the British case is twofold. There were such haste and uncertainty in the minds of the negotiators due to the inadequate preliminary discussion that no clear intention can reasonably be set up apart from and in conflict with the clear words to which they attached their signatures. And so long as the *litera scripta* of the enactments of the two confirming legislatures stands unrepealed the “intention”—which must necessarily be the intention of the confirming legislature on either side—can only be set up or effected in accordance with the usual and recognised principles of statutory interpretation.

If, then, the “intention” of the negotiators could have been shown to have been different from the legal effect of the amending Treaty, it was open to Britain to claim a rectification of the mistake thus made. This would have necessitated the amendment of the amending Treaty by an instrument of equal authority—a further amending Treaty. It would have been necessary for the British authorities to claim relief on the grounds that the departmental officials and parliamentary draftsmen and signatory Ministers had all alike made a mistake of fact or law, and to prove that mistake by producing the memoranda of agreement, correspondence, preliminary drafts, official calculations on either side, to demonstrate that there had, in fact, existed a fully considered and agreed arrangement which was inconsistent with the terms actually signed. But nothing of the sort was done.

There can be no doubt that the disputed document of 19th March, 1926, which followed four months later, marked the beginning of a British attempt to retrieve the position which resulted from this document. It is clear

that the British financial authorities had previously thought that they had secured the annuities and they now apparently wanted to re-secure them in spite of the amending Treaty. But the attempt remained abortive. The heads of the proposed amended arrangements, as has been seen, were never worked up into appropriate form as an Agreement for representative signature and statutory confirmation. It is inconceivable, therefore, that the disputed Blythe-Churchill document, with all its infirmities thick upon it, could be held by any dispassionate and instructed mind to override the amending Treaty of December, 1925, or to operate, on an equality with it, as the Ultimate Financial Settlement requisite under the original Treaty.

The matter, therefore, remains open—and still requires definitive settlement.

(iii) *What Follows? The Merits*

Things dragged on inconclusively, as before, between 1926 and 1932, until the coming of new Ministers in the Irish Free State, when the growing public dissatisfaction in Ireland at the irregular and not fully disclosed position as to the Anglo-Irish financial relations was brought to a head. It then appeared that, in the British view, the root of Britain's claim to the annuities lay in the Hills-Cosgrave Agreement of 12th February, 1923, which was now for the first time brought to light. What special virtue could lie in this apparently provisional and temporary administrative document to warrant a claim that it could determine ultimate rights of ownership has never been demonstrated. Nor, if it aimed at determining those rights, has it ever been shown what were the grounds for doing so in the sense claimed, or what was the method of approach. Nor, again, supposing that a doubt existed, is it clear what valuable consideration was given for an agreement deciding it in Britain's favour. When President Cosgrave signed it

he was at the very nadir of his fortunes as head of the Irish Free State—he was in London as a suppliant for the aid of the British Executive Government. He was accorded that aid in pursuance of an agreement which admittedly rested upon oral arrangement alone. It is not to be supposed that in these circumstances he was unduly stiff in support of Irish financial interests, in regard to which, indeed, he cannot have been specially prepared. But did the oral arrangements and understandings in regard to the arrest and internment of those who were trying to subvert his government extend into the financial sphere so as to engage his personal honour to a final and lasting support of a British claim to the annuities?

When, then, in 1932, Britain's right to the annuities was sharply challenged by Mr. de Valera's Government, the British case was formally stated by the Secretary of State for Dominion Affairs. Then, as subsequently in the negotiations of October, 1932, it was based on the Hills-Cosgrave Agreement of 12th February, 1923, as confirmed by the Blythe-Churchill document of 19th March, 1926, which Mr. Thomas's despatch declared to be "binding in law and honour on the Irish Free State . . . in exactly the same way as the Treaty itself is binding on both countries."

There is an apparent uneasiness as to the legal aspect in Mr. Thomas's despatch and an attempt—a most successful one—to set a head-line for anti-Irish commentators in the ensuing controversy.

"In the first place His Majesty's Government in the United Kingdom consider that, in order to avoid misunderstanding, it is desirable to place on record the origin and nature of the Irish Land Annuities. These are not payments from Government to Government. In principle the main transaction is not one between the two Governments at all, but between the Irish tenant purchaser and the holder of the Land Stock . . ."
(Despatch, 9th April, 1932).

Thus it was no question of Anglo-Irish financial relations—of Irish revenue whose proper destination was a matter of high policy or of law or of both. No! The annuities were private debts in process of liquidation which the Irish Free State was now intercepting dishonestly and appropriating to its own purposes. Lord Hailsham lent his powerful aid:—

“What is happening is not that an intolerable burden is being placed on the Irish Free State but that the Irish Free State Government are collecting money which belongs to the holders of Land Stock, which they are bound to hand over to us to pay the holders of that stock, and are keeping the money with which that debt ought to be paid in their own pockets” (Hansard 11th July, 1932, Col. 761).

These statements, also, like others from the same source and on the same issue, which are referred to above, must be regarded as pleas of fact rather than statements of objective fact. For as they stood they were literally untrue. The land annuities were expressly made portion of the public revenue of Ireland—of Southern Ireland and Northern Ireland—by the Government of Ireland Act, 1920, and although they had normally been applied to the service of the several British Government land stocks they, in no sense whatsoever, legally or morally, belonged “to the stockholders.” United Kingdom credit, on which public loans are raised, does not have to be supported by the hypothecation of assets or revenues to the lenders. The annuities have remained and still are—as regards those derived from Northern Ireland—portion of the public revenue of Northern Ireland. Those derived from the Irish Free State were at the date of the Treaty part of the public revenue of Southern Ireland. And if the British claim were valid—however it were based—it must have been that the legal right to that portion of the public revenue

of Southern Ireland had been somehow detached from Ireland and transferred to Britain. How then was this transfer supposed to have been effected? No faintest ray of light was shed on this topic which was not permitted to emerge in the official despatches. The picture painted for the press and the British propaganda agencies was a picture of private debts in process of liquidation, of the Irish Free State undertaking the duty as agent of collecting and transmitting the payments and thereafter wrongfully misappropriating the moneys so entrusted to it.

There is unfortunately no record of how the matter was presented to President Cosgrave when he was asked to sign in February, 1923. But, seeing that he has long been arguing, in defence of what he then did, that the annuities did not belong to Ireland, it may perhaps be assumed that that is the representation that was made to him at the time and that he accepted it. At once the difficulty arises, "If Britain's legal ownership of the annuities was so clear why was it thought necessary to buttress it by a special agreement to recognise it?" And "Why did Mr. Thomas later base himself entirely on President Cosgrave's agreement?" The conclusion seems to be irresistible that, in so far as any rights were being affected, there was an attempt on the part of the representatives of the British Treasury to stake out a claim to the annuities for the purpose of the Ultimate Financial Settlement when it should come: and it would appear that President Cosgrave, without full knowledge and consideration of all the circumstances, and accepting the legal views put before him, gave his assent.

Now what was the position in Ireland when the Treaty came?

The Government of Ireland Act, 1920, was, in the British view, the law of the land. And the Treaty settlement, as has been seen in an earlier chapter, was effected by the method of grafting it on to the administrative, executive, financial, and legal system of the British era.

Thus the previously existing laws continued in existence, but subject to the new Constitution, until amended or repealed by the new legislature. The one exception to this was the Government of Ireland Act, 1920, which simultaneously with the ratification of the Treaty on 5th December, 1922, was partially repealed by the Irish Free State (Consequential Provisions) Act. The latter Act, as its title indicates, was a purely ancillary measure subsidiary to the Treaty and Constitution and dealing with resultant changes in detail. It could not, and it did not purport to, alter the Treaty settlement in any respect.

Under the Government of Ireland Act, 1920, the land purchase annuities had become part of the public revenue of Southern and Northern Ireland respectively. The Parliaments of Southern Ireland and Northern Ireland respectively were, it will be remembered, to be jointly represented in the Council of Ireland (see pages 234-5 above) which was the contemplated nucleus for an ultimate all-Ireland Parliament when the "day of Irish Union" should be reached. Full powers were created whereby, without any legislative or other action whatever at Westminster, an all-Ireland Parliament could be created by the parallel action of the two subordinate Parliaments. In this event the creation of an Irish Exchequer was provided for with an express direction that into it, to the credit of the Irish Consolidated Fund, should be paid (unless otherwise directed by the two Parliaments) the land purchase annuities and certain other revenue. When the Treaty came it expressly preserved the Council of Ireland and the right of the Irish Free State Parliament to take the place of the extinguished Parliament of Southern Ireland in electing members to it. When the Treaty was ratified the Consequential Provisions Act enacted a general repeal, subject to certain general exceptions, of the Government of Ireland Act in respect of all Ireland other than Northern Ireland. Amongst the general exceptions, which are set out in the

First Schedule, are provisions relating to the functioning of the Council of Ireland, its constitution and the transfer to it of powers. Thus the general repeal, subject to general exceptions, left untouched the Council of Ireland and the matters appurtenant to it and its ultimate contemplated development into an all-Ireland Parliament. The unrepealed provisions therefore continued to authorise the creation of an all-Ireland Parliament and an all-Ireland Exchequer into which, unless the two Parliaments representing the Irish Free State and Northern Ireland respectively should otherwise direct, the land purchase annuities would have to be paid. The land purchase annuities were thus Irish public revenue at the immediate and ultimate disposition of the two Irish Parliaments.

What then was the representation of the state of the facts and of the law made to President Cosgrave from the British side when he was asked to sign? In the absence of authentic information it is necessary to examine the possibilities. There are but three legitimate possibilities:—

- (i) That the arrangement was determining no rights, but was merely a "carry on as before" arrangement pending the ultimate financial settlement;
- (ii) that the Government of Ireland Act, 1920, had never come into force in Southern Ireland (or the Irish Free State area);
- (iii) that if it had come into force the "gift" of the purchase annuities to Southern Ireland had afterwards been repealed by the Irish Free State (Consequential Provisions) Act.

If we were to adopt (i) then *cadit quaestio* and the case made in Mr. Thomas's despatches becomes pointless.

In support of (ii) it can be urged that it has been strongly and frequently put forward by Mr. Cosgrave. But it rests on a failure to distinguish between legal force and practical force. The Government of Ireland Act, 1920, became law.

It became legally operative even though Ireland—apart from Northern Ireland—repudiated it and was in open and fairly successful revolt against all it stood for. But the Parliament of Southern Ireland was actually elected and provision for its dissolution within four months was made by Sec. 1 (2) of the British Treaty confirmation Act. Certain provisions of the Act and particularly those relating to the Council of Ireland and its functions, were woven into the fabric of the Treaty. Thus, Northern Ireland, whether or not it “contracted out” of the Irish Free State was to exercise the powers conferred upon it by that Act; and the Council of Ireland was expressly preserved by Articles XIII and XIV of the Treaty.

In support of (iii) can be adduced the fact that Mr. Baldwin, as Chancellor of the Exchequer, on 27th March, 1923, little more than a month after the Hills-Cosgrave Agreement—told the House of Commons that “those arrangements” i.e. the “gift” of the land purchase annuities, so far as the Irish Free State was concerned, had been repealed by Section 1 of the Irish Free State (Consequential Provisions) Act, 1922—a statement which overlooked the exceptions from that repeal as specified in the Schedule. On the other hand, the United Kingdom representatives in the negotiations of October, 1923, whilst admitting that “it was provisional in the sense that it was expressed to be without prejudice to the Ultimate Financial Settlement”; definitely pleaded that

“The financial provisions of the Act of 1920 did not, the United Kingdom representatives are advised, ever come into force as regards Southern Ireland and the proposed settlement of 1920 was replaced by the Treaty of 1921 under which the Irish Free State acquired Dominion status” (1932. Cmd. 4184).

This seems to leave the British case, as formulated later, hovering indeterminately between the conflicting views of

President Cosgrave and Mr. Baldwin. But how was it put to President Cosgrave in February, 1923?

It seems more than possible that Mr. Baldwin, as Chancellor of the Exchequer, was advised early in 1923 that the Consequential Provisions Act had repealed the gift of the annuities to the Irish Free State as representing Southern Ireland. But that argument—whose infirmity has been shown in the preceding pages—seems not to have reappeared from the controversial armoury of the British representatives. In the early months of 1923 in the hey-day of the recent Die-Hard Conservative triumph over the Coalition Government that had given Britain the Treaty, the Irish Free State (Consequential Provisions) Act 1922, seems to have bulked disproportionately large in the eyes of the new British law advisers as an instrument for restricting the effect of the Treaty settlement. Has it not been seen that it led to ambitions to take a hand in the maintenance of order in the Irish Free State and to attempt to legislate by Order in Council for the Irish Free State—ambitions and attempts which came to a disastrous end in the higher appellate tribunals of Britain and in the necessity for an Indemnity Act for the protection of the Home Secretary and others for having acted without proper statutory authority? It seems by no means impossible that the legalists who were responsible for all this may also have conceived of the possibility of invoking the same act to alter, on the financial side, the effect of the Treaty settlement which it was designed to implement. It would have been no more fallacious in the one case than in the other. If this be so, it would appear to have been the root of all the subsequent confusion and controversy and conflict.

What then are the general merits of the rival claims to the annuities? The Hills-Cosgrave Agreement of February, 1923, cannot well have created a right that would not have otherwise existed. It was provisional in form and, on its face, it shows no consideration passing for any concession

claimed to have been made. The Boundary Agreement, 1925—a final and ratified instrument—expunged all Irish liability in respect of the public debt of the United Kingdom—and the annuities were, if and in so far as they were receivable, applicable in payment of interest and sinking fund in respect of part of that public debt. The Blythe-Churchill document of March, 1926, is seen to be questionable both as to form and substance. So far as it can be claimed to be an agreement, its provision as to the annuities is repugnant to the relevant article of the ratified Boundary Agreement (which it ignores) and it would seem to relate back to the ambiguous and provisional Hills-Cosgrave Agreement which it also ignores. And both these latter instruments—as distinct from the ratified Boundary Agreement—appear to have resulted from a mistake in law as to where, *prima facie*, the title to the ownership of the annuities actually lay. But wherever that *prima facie* title lay the subject would fall within the ambit of a comprehensive ultimate financial settlement. If the British claim were pressed that it was not intended that the Boundary Agreement should apply to the annuities, the only possible occasion for seeking redress—can it be doubted?—would be in the negotiation of such an ultimate settlement where everything could be considered including the *prima facie* ownership. But such a settlement, to be effective, would have to be embodied in an instrument of equal authority to the Boundary Agreement, that is, it would have to be in Treaty form. And not only are most students of constitutional law satisfied that the Blythe-Churchill document is obviously inadequate in that respect, if regard be had to the municipal law of these countries, but there is a similar confidence that a tribunal administering international law would be constrained to hold that an instrument purporting to be the Ultimate Financial Settlement in final implementation of the Treaty, especially having regard to the repugnancy of its provisions to those of the amending Treaty,

could not be finally binding in the absence of representative execution and of parliamentary ratification.

If such a negotiation be undertaken there are two further considerations which will necessarily come into prominence. The first relates to Ireland's right of counter-claim in respect of past demonstrated over-taxation. It had not been presented nor even formulated at the time of the Boundary Agreement. It was not released in that instrument and in the Blythe-Churchill document, where amongst the numerous Irish sacrifices there is an express waiver of the Irish claim to a share of the partnership assets, there is no corresponding surrender of the over-taxation claim. The second has, of course, only an indirect relevance, but it touches taxable capacity as a basis for determining equitable liability. Under the Treaty settlement Northern Ireland undertook an obligation to contribute to Imperial Expenditure of a very much wider range than the obligation of the Irish Free State under Article V and it acquired no rights to set-off and counter-claim. How comes it that, without statutory reduction of its liability, the effective net contribution of Northern Ireland has long since approached vanishing proportions, whilst the Irish Free State, with its much smaller liability, actually extinguished by the amending Treaty, is actually visited with all the rigours of "economic war," with its attendant damnatory propaganda, for the attempted exaction of large annual sums to which no unimpeachable title can be shewn?

CHAPTER IX

THE TREATY SETTLEMENT AND NORTHERN IRELAND

THE substance of the Treaty settlement was, on broad lines, that the whole of Ireland should have its distinct nationhood re-established with the status of a Dominion. But Northern Ireland with its local autonomy, as then recently acquired, was to have complete freedom of choice whether it would continue to enjoy that autonomy inside the new Irish Free State or inside the realm of Great Britain. Northern Ireland exercised its choice and thereafter formed part of the United Kingdom of Great Britain and Northern Ireland.

The British Government in 1921 was anxious to treat Ireland as a whole. It realised—and there is assuredly little need to develop the thesis—that the partition of an ancient nation and territory is a perilous expedient attended by innumerable present inconveniences and ultimate explosive potentialities. Some moral pressure, indeed, was put upon the Northern Ireland leaders, in the name and for the sake of Imperial interests, to accept a much safeguarded position within the Irish Free State. A powerful minority in an unpartitioned Ireland would have exercised an immense influence in determining the nature of the future relations between the new Irish Free State and the British Empire. This appeal in the name of Imperial interests was supplemented by arguments that a choice in favour of exclusion from the Irish Free State would involve the abandonment of the pro-British sympathisers in the three Ulster counties and the twenty-three counties of Leinster, Munster and Connaught, who would be left in the Irish Free State without the political

co-operation and sympathy of their Northern Ireland friends.

The appeal failed. Northern Ireland "contracted out." The appeal in the name of Imperial interests had not been supplemented by any governmental pressure, for British public life was still dominated by the slogan "Ulster must not be coerced." On the strength of the Irish nation, Northern Ireland cut itself off from its political friends and co-religionists outside the Six County area, and concentrated its efforts in getting rid of such political and other factors of the Treaty settlement as provided any possible inducement to a subsequent reunion with the parent Ireland. In these efforts, as has been seen, it had the assistance of its British friends, the Die-Hard Conservatives, who since the autumnal General Election of 1922 have, with brief intermission and exceptions, dominated the policy of Great Britain.

There were three such factors. The first was the adjustment of the boundary designed, as it was supposed, to liberate from Northern Ireland control substantial populations of Irish Catholic Nationalists. The second was the continued existence (in virtue of the Government of Ireland Act, 1920) of the Council of Ireland which purported to be the nucleus of an all-Ireland legislature. The third was the liability of Northern Ireland for its proportionate share of British Imperial liabilities and expenditure. Of these three factors tending towards the reunion of Ireland, the first two were finally destroyed by the Boundary Agreement of December, 1925. The Irish Free State lost just so much of its leverage in favour of reunion under that Agreement, which was negotiated and executed under the circumstances described in a previous chapter and which exists to-day as a valid and binding Agreement that nobody in Ireland thinks of impeaching. As to the third no finality had been attained.

No finality has been attained as to the third—probably

because the facts have, somehow, not clearly emerged, and because those familiar with the working and effect of the figures are not dissatisfied with what is happening. Those figures, so far as they are definitely ascertainable, point unmistakably to one conclusion and to one conclusion alone. Without further amendment of the Treaty and without statutory change, the third factor has also been destroyed in practice by administrative methods.

A dividing line in the history of events lies in December, 1925, when the Boundary Agreement was made. Before that date Northern Ireland made a "contribution" to Imperial liabilities and expenditure as prescribed by the law, though not to the extent contemplated by that law. Yet the annual amounts were not insubstantial although they were largely neutralised by heavy subsidies to Northern Ireland paid out of the British Exchequer. After that date and down to the present time the Northern Ireland "contribution" has become progressively smaller and the subsidies have, in every year but one, rendered the balance between the two a balance paid by Britain to Northern Ireland. In one year, the financial year ending 31st March, 1928, the Northern Ireland "contribution" exceeded the British subsidies by some £371,000, but in every other year the subsidies exceeded the "contribution."

This state of account has established and stabilised a position which in the pre-Treaty discussions the Prime Minister of Great Britain, in writing to the Prime Minister of Northern Ireland, refused to regard as possible. "It would be inevitable," he wrote, "if Northern Ireland were to remain a part of Britain, for Belfast to bear the same burden as Liverpool, Glasgow or London." In this happy—for Northern Ireland—position the representatives for Belfast in Parliament at Westminster can vote for policies on an equality with Glasgow and Liverpool and London but without sharing their burden in the payment for their cost. The Northern Ireland Exchequer has thus an

elasticity as to expenditure which must be the envy of Chancellors and Finance Ministers elsewhere. Is it any wonder that there have been mild complaints at Westminster that Northern Ireland subsidies have availed to divert shipbuilding contracts to Belfast from the English and Scottish shipyards. Is not this the explanation of the ability of the Northern Ireland Ministry of Labour (*The Times*, 22nd February, 1937) to offer to pay travelling fares to and fro and maintenance allowances to Northern Ireland working men who seek employment anywhere in Britain save in a depressed area?

(a) *Northern Ireland Contribution—Relative Taxable Capacity*

The several annual amounts payable in respect of the Northern Ireland contribution and the amounts of British payments to Northern Ireland and the balance as between these two annual items are shown in Table 1, which together with the following Tables and Charts has been prepared for this book by the Intelligence Branch of *The Economist* from official records. The two categories of payments which are thus contrasted are the same as figured in a statement of Major Elliot, Financial Secretary to the Treasury, to the House of Commons on the 27th June, 1932. Here, however, the figures are the revised figures brought up to date. The land purchase annuities, though *prima facie* Northern Ireland revenue, are treated as payments by Britain to Northern Ireland—presumably because they are excluded from the calculation of Northern Ireland resources in assessing the amount of Northern Ireland's contribution for Imperial purposes. In this sense they may perhaps be considered by the Treasury as a payment or gift from Great Britain to Northern Ireland.

Apart from the general effect, as above described, of the figures, the most noteworthy feature is the rapid reduction, beginning after 1925, in the amount of the Northern

Ireland contribution as fixed by the Joint Exchequer Board. Whether the provisions of the Government of Ireland Act, 1920, have been adhered to or not, and there are no means of knowing how exactly the Joint Exchequer Board arrives at its decisions, the fact remains that a not insubstantial portion of the aggregate wealth of the United Kingdom of Great Britain and Northern Ireland is making no net contribution to the cost of Imperial Services which comprise so large a proportion, some one half to two thirds, of the total expenditure in the British Budget. The amount thus escaping the common burden by comparison with the amount which does not so escape can be conjectured by the application of certain simple tests. Tables II and III show respectively for Northern Ireland and Great Britain the income assessable to Income Tax in each country, and the total Exchequer receipts: in addition are shown the British (approximate) Exchequer issues for Imperial purposes and the nominal Northern Ireland contribution with the actual net balance in comparison with it. The annual income assessable of Northern Ireland is seen to be roughly somewhat less than one-ninetieth of the corresponding British figure. The Exchequer receipts of Northern Ireland are—roughly—from one seventy-fifth to one-eightieth¹ with an upward tendency. A one hundredth contribution to Imperial purposes would have been from £4 millions to £6 millions. Table IV gives the Northern Ireland Exchequer receipts in some detail—showing separately the transferred taxation which is collected by the Northern Ireland Government and the reserved taxation which is collected and accounted for by the British Government. A different indication of the relative wealth and taxable capacity of the two contributory areas is furnished by Table V, which gives the shipping figures for Northern Ireland by comparison with the United Kingdom totals.

¹ The relatively higher level of this figure is due doubtless to the receipts including payments from the British Exchequer.

From these it will be seen that Northern Ireland shipping has been—roughly—during the period under review a proportion of the total United Kingdom of from a twentieth to a twenty-fifth and with an upward tendency.

The general relationship and tendency of the Northern Ireland and British figures in regard to Imperial expenditure and Northern Ireland's vanished contribution to it, is depicted in Graphs A and B. Graph A shows Britain's annual income assessable to income tax, gross revenue and Imperial expenditure in their relationship to one another. Graph B shows Northern Ireland's annual income assessable to income tax, gross revenue and the nominal and the actual contribution to Imperial Expenditure in their relationship to one another.

The result of these figures seems to prove that the finance of the Government of Ireland Act, 1920, has broken down and that the Northern Ireland Exchequer not only fails to make any net contribution to British Imperial Expenditure but is actually dependent on the bounty of the British Exchequer for the balance of its annual Budget. In Imperial policy, therefore, Northern Ireland helps to call the tune but does not help to pay the piper. In Northern Ireland domestic policy, Northern Ireland alone calls the tune and Great Britain helps to pay the piper. Whether these subjects are actually deemed to be beyond the range of parliamentary discussion—out of order—at Westminster or not, there never appears to be any effective discussion or any recognition that the Parliament of the United Kingdom and Northern Ireland has any responsibility as supreme authority in regard to internal happenings in Northern Ireland, where executive authority is exercised under its delegated authority and rendered possible by its bounty.

As to the fining down almost to vanishing point of the Northern Ireland nominal contribution, no information appears to be available beyond the Reports of Lord Colwyn's

Committee, which established as a basis the principle that it should be fixed at the amount of the surplus of revenue over expenditure subject to certain conditions and adjustments. But whether the nominal contribution be larger, as in the period up to 1925, or smaller, as in the subsequent period, the true contribution is indisputably no more and no less than the balance that remains after taking the British subsidies into account. The Northern Ireland contribution to Imperial liabilities and expenditure, considered on this basis, has for the full period of the separate existence of Northern Ireland been something rather less than nothing.

(b) *The Explanation*

It may be freely admitted that there are obscurities in regard to these accounts and that controversy may easily be raised as to particular items or methods of calculation. But the broad results remain. There can be no controversy as to the basis laid down by the Colwyn Committee for the fixing of the amount of Northern Ireland's contribution nor as to the progressive fining down of that contribution from its maximum level of £6,685,600 in 1922-23 to £24,000 in 1934-35.

The explanation is of a two-fold character. It is in part of a general and in part of a special explanation.

The general explanation is that Northern Ireland, as a distinct semi-national unit is too small and too limited as to wealth and general resources to support a grandiose administration on a national scale, with Governor, Privy Council, two chambered Legislature, Prime Minister and Cabinet, Judiciary and administrative departments on the British model. And the cost of all this is increased by the fact that, not having complete national autonomy, Northern Ireland is subject to a dual administration and has to pay to Britain the cost of the British administration in Northern Ireland of the reserved services which remain

in British control. It has already been seen that the Colwyn Committee took the standard expenditure of Northern Ireland at £4 19s. 9.32d. per head, whilst for wealthy Britain its figure was £3 18s. 5.97d.

The special explanation is that Northern Ireland contains a large minority—about one-third of its total population—which is held in subjection by force. The minority in Northern Ireland is Nationalist and anti-partitionist in sympathy and predominantly though not exclusively Catholic in religion. It has complained that it is effectively if not directly disfranchised, for the purpose of elections to the legislature and to local administrative bodies, and almost entirely shut out from Government employment. Its complaint goes further. It contends—and the contention has been supported by responsible non-official investigators from Britain—that by the special legislation passed by the Northern Ireland Parliament it has been placed unreservedly under the control of the executive and deprived of all the guarantees of civil liberty which are by common law and statute the right of all other citizens of the United Kingdom of Great Britain and Northern Ireland. It is no part of this book to enter upon these controversies otherwise than to note their existence and to point out that that existence helps to explain the very high level of administrative expenditure in Northern Ireland. The community exists in a state of stabilised tension subject to occasional disturbance and with control maintained on more or less sectarian lines of demarcation, by an expensive establishment of regular police and of kindred supporting organisations, with the British army in the background ready if called upon to give further support. The cost, direct and indirect, is necessarily very heavy.

As regards this cost certain indications are available. Table VI sets out the cost of the Royal Ulster Constabulary and of the "Special Constabulary" so far as they can be ascertained from the public accounts. Table VII gives

SETTLEMENT AND NORTHERN IRELAND 281

TABLE I

Exchequer Payments between Great Britain and Northern Ireland.

<i>Financial Year.</i>	<i>Payments to Northern Ireland.</i>	<i>Northern Ireland Contribution.</i>	<i>Balance in favour of</i>	
			<i>Great Britain.</i>	<i>Northern Ireland.</i>
	£	£	£	£
1921-22	642,670	2,820,820	2,178,150	—
1922-23	4,636,400	6,685,600	2,049,200	—
1923-24	3,975,100	4,517,900	542,800	—
1924-25	2,081,800	3,175,000	1,093,200	—
1925-26	2,738,700	2,275,000	—	463,700
1926-27	1,679,300	1,350,000	—	329,300
1927-28	1,078,900	1,450,000	371,100	—
1928-29	1,333,100	1,175,000	—	158,100
1929-30	1,252,800	855,000	—	397,800
1930-31	1,489,900	545,000	—	944,900
1931-32	1,135,400	298,000	—	837,400
1932-33	841,400	75,000	—	766,400
1933-34	700,500	76,000	—	624,500
1934-35	657,700	24,000	—	633,700
1935-36	1,409,000(a)	14,598(b)	—	1,394,402(a)
1936-37	1,205,900(a)	500,000(b)	—	705,900(a)

(a) Estimate.

(b) Provision for Imperial Contribution and Surplus (Provisional).

This table does not take into account the residuary share of reserved taxation.

TABLE II
Northern Ireland Public Finance
 (£000)

<i>Financial year ending March 31st.</i>	<i>Income Assess- able to Income tax—Northern Ireland.</i>	<i>Total Exchequer Receipts.</i>	<i>"Northern Ireland Contribution."</i>	<i>Northern Ireland net payment to Great Britain.</i>
	£	£	£	£
1922-23	—	13,281	6,686	+2,049(<i>b</i>)
1923-24	21,732	12,178	4,518	+ 543
1924-25	21,935	11,329	3,175	+1,093
1925-26	25,896	10,746	2,275	— 464
1926-27	21,621	10,113	1,350	— 329
1927-28	26,001	10,341	1,450	+ 371
1928-29	22,873	10,203	1,175	— 158
1929-30	26,229	10,375	855	— 398
1930-31	25,856	10,765	545	— 945
1931-32	28,693	10,811	298	— 837
1932-33	27,869	11,311	75	— 766
1933-34	27,036	10,683	76	— 624
1934-35	26,915	11,007	24	— 634
1935-36(<i>c</i>)	—	11,832	15	—1,394

(*b*) The minus sign in this column denotes a net payment by Great Britain.

(*c*) Estimates.

TABLE III
British Public Finance
 (£000)

<i>Financial Year.</i>	<i>Income assessable to Income tax—Great Britain.</i>	<i>Total Exchequer Receipts.</i>	<i>Exchequer (a) Issues for "Imperial Purposes."</i>
	£	£	£
1922-23	2,292,671	914,012	559,104
1923-24	2,281,577	837,169	573,271
1924-25	2,378,791	799,436	582,425
1925-26	2,310,995	812,062	588,391
1926-27	2,315,421	805,701	608,874
1927-28	2,390,232	842,824	568,690
1928-29	2,471,576	836,435	549,219
1929-30	2,504,528	814,970	532,221
1930-31	2,471,191	857,761	533,712
1931-32	2,696,410	851,482	489,240
1932-33	2,525,788	827,031	471,101
1933-34	2,478,038	809,379	391,234
1934-35	2,588,723	804,629	395,062

(a) This item is an approximation only.

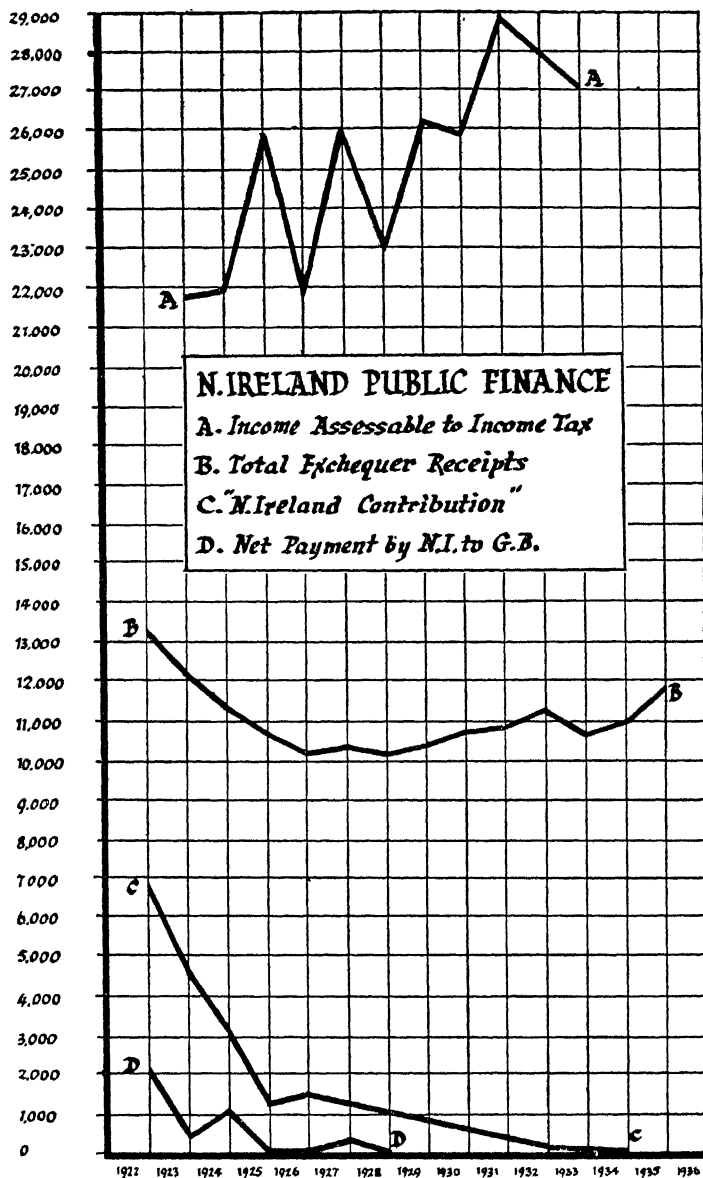
TABLE IV
Northern Ireland Revenue (Exchequer Receipts)
 (£'000)

Item	1922/ 23	1923/ 24	1924/ 25	1925/ 26	1926/ 27	1927/ 28	1928/ 29	1929/ 30	1930/ 31	1931/ 32	1932/ 33	1933/ 34	1934/ 35	1935/ 36	Estim. 1936/ 37
<i>Tax Revenue</i>															
Transferred:															
Estate, etc. duties	486	434	628	541	535	595	666	704	665	676	569	503	527	779	600
Stamp duties	268	260	315	282	256	260	294	227	223	201	209	235	244	258	265
Excise duties	170	146	168	168	162	134	119	136	136	131	124	125	130	128	128
Motor vehicle duties	204	250	284	336	378	421	429	467	528	559	559	591	634	683	708
	1,128	1,090	1,395	1,327	1,331	1,410	1,508	1,534	1,552	1,567	1,461	1,454	1,535	1,848	1,701
<i>Reserved:</i>															
Customs and excise	6,345	4,822	4,203	3,882	3,711	3,821	3,955	3,970	4,102	3,580	4,658	4,490	4,800	4,864	5,410
Income and super tax	3,708	4,281	3,758	3,250	3,189	3,247	2,830	3,043	3,238	3,753	3,309	2,795	2,695	2,760	3,205
Corporation profits tax	269	268	220	224	72	15	40	22	30	57	10	5	5	6	5
Excess profits duty	240	77	37	232	22	9									
	10,562	9,448	8,218	7,588	6,994	7,092	6,825	7,035	7,370	7,390	7,977	7,290	7,500	7,630	8,620
Total receipts from taxes	11,690	10,538	9,613	8,916	8,325	8,502	8,333	8,569	8,922	8,957	9,438	8,744	9,035	9,478	10,321
<i>Non-Tax Revenue.</i>															
Post Office	775	822	819	810	793	829	843	869	884	890	902	920	945	980	990
Fee stamps, etc.	11	14	50	34	36	54	†	†							
Total non-tax revenue*	1,591	1,640	1,716	1,830	1,788	1,839	1,870	1,806	1,843	1,854	1,873	1,939	1,972	2,354	2,050
Total revenue	13,281	12,178	11,329	10,746	10,113	10,341	10,203	10,375	10,765	10,811	11,311	10,683	11,007	11,832	12,371

* Including other items (transferred).

† Receipts from sale of reserved fee stamps now appropriated in aid of the vote for the Supreme Court of Judicature in Northern Ireland.

£ Thousands



£Millions

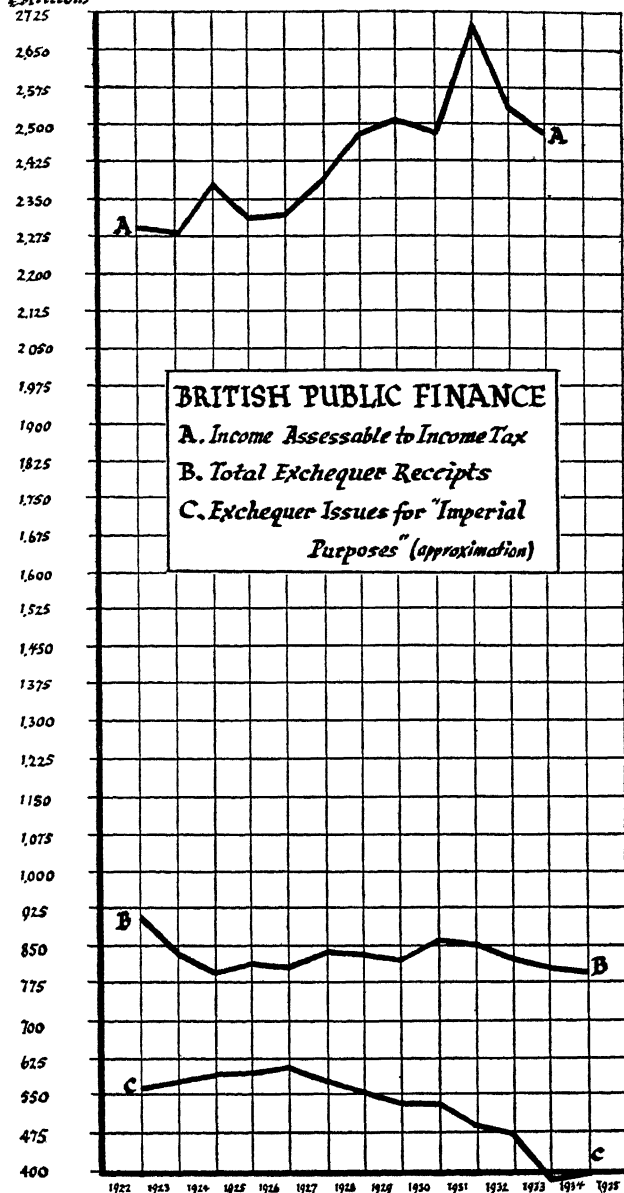


TABLE V
Shipping Tonnage* at N. Ireland Ports
(000 net tons)

Item	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934
Foreign Trade.											
Tonnage arrived .	2,473	2,464	2,984	3,008	3,337	3,626	4,354	3,789	3,402	3,257	3,322
Tonnage departed .	2,137	2,183	2,807	2,732	3,061	3,400	4,076	3,492	3,070	3,012	3,013
Coasting Trade.											
Tonnage arrived .	2,924	2,927	2,201	2,954	2,994	3,276	3,515	3,541	3,600	3,595	3,899
Tonnage departed .	3,317	3,246	2,374	3,274	3,217	3,481	3,859	3,879	3,939	3,831	4,178
Total N. Ireland .	10,851	10,820	10,366	11,968	12,609	13,783	15,804	14,701	14,011	13,695	14,412
Total U.K. .	270,293	263,640	233,020	282,745	286,801	303,919	304,625	285,271	277,745	281,908	289,495

* British and foreign; steam, motor and sailing; with cargoes and in ballast.

N.B.—No comparable statistics are available for earlier years.

TABLE VI

*Northern Ireland Expenditure.**(Exchequer issues in years named.)*

<i>Financial Year ending March 31st</i>	<i>Special Constabulary</i>	<i>Royal Ulster Constabulary</i>
	£	£
1923	2,871,278	597,112
1924	1,525,000	676,143
1925	1,395,758	821,246
1926	1,141,000	790,000
1927	139,000	782,000
1928	56,000	736,000
1929	46,000	710,000
1930	53,905	744,119
1931	57,289	743,000
1932	30,100	678,800
1933	32,000	661,700
1934	40,938	669,171
1935	50,046	668,856

Later information not yet available.

TABLE VII
Strength of the Royal Ulster Constabulary

Area	1927 (a)		Authorised Establishment (c) (All Ranks)						
	Average popul'n. per plcemn.	Average acreage per plcemn.	1927	1928	1929	1930	1931	1932	1933
	persons	acres							
Antrim	743	2,910	258	258	269	274	276	268	268
Armagh	518	1,540	213	210	207	210	221	217	226
Down	671	1,950	312	322	327	322	308	294	299
Fermanagh	322	2,510	180	179	180	188	190	184	185
Londonderry	573	3,150	165	160	155	162	149	146	142
Tyrone	495	3,000	268	262	267	272	268	262	259
Depot	—	—	91	84	79	55	24	82	106
Belfast City (including G.H.Q.)	(b) 317	(b) 13	1,310	1,284	1,266	1,251	1,219	1,197	1,179
Derry City	(b) 361	(b) 20	125	125	128	129	135	128	127
Total.	—	—	2,922	2,884	2,878	2,863	2,790	2,778	2,791

(a) Based on population and area figures for 1926 (from the N.I. Census).

(b) Based on population and area figures for the respective County Boroughs.

(c) Earlier figures by counties, etc., not available.

TABLE VIII

Scottish Police Returns. December, 1926.

<i>County</i>	<i>Average Population per Constable</i>	<i>Average Acreage per Constable</i>
Aberdeen	1,378	11,288
Argyll	948	24,573
Ayr	1,133	3,588
Banff	1,364	10,387
Berwick	1,009	1,044
Bute	770	5,819
Caithness	1,230	19,832
Clackmannan	1,341	2,213
Dumbarton	835	1,273
Dumfries	1,083	12,831
East Lothian	1,187	4,274
Fife	1,163	1,565
Forfar	1,062	10,719
Inverness	976	43,217
Kincardine	1,449	11,580
Kinross	884	5,988
Kircudbright	1,195	19,688
Lanark	993	1,316
Midlothian	1,050	2,555
Moray	1,259	9,277
Nairn	879	10,734
Peebles	1,022	15,126
Perth	1,085	18,737
Renfrew	806	1,174
Ross and Cromarty	1,388	39,403
Roxburgh	716	10,624
Selkirk	644	11,491
Stirling	1,185	2,492
Sutherland	989	67,066
West Lothian	1,182	1,082
Wigtown	1,282	13,659
Glasgow	491	13
Edinburgh	519	43
Total Scotland	751	2,830

figures showing the scale of the establishment of the Royal Ulster Constabulary and their ratio of numerical strength to the number of population and to the acreage of the respective areas—whilst Table VIII gives the parallel figures for Scotland for purposes of comparison. From these tables it will readily be seen that by comparison of the normal establishment in each case Northern Ireland is much more heavily policed than Scotland. Part of this cost relates probably to provision for abnormal conditions. Mr. Nevill Chamberlain, the Chancellor of the Exchequer, told the House of Commons (Hansard, 30th July, 1925, Col. 2480) that the Northern Ireland votes for 1935-36 provided for payment of bonus to 12,200 members of the Special Constabulary. And other costs have undoubtedly been incurred and met from time to time without their being readily traceable in the public accounts. Thus Mr. Winston Churchill, as Chancellor of the Exchequer in 1925, told the House of Commons (Hansard, 8.12.25, Col. 362) that on the occasion of the boundary settlement he was remitting a debt due by Northern Ireland for £700,000 in respect of arms and equipment furnished by the British Government. And it will be remembered that both Mr. Baldwin, the Prime Minister, and Mr. Churchill told the House of Commons, in December, 1925, that the Government had considered it its duty to subscribe to the costs of the Special Constabulary of Northern Ireland. The sums so subscribed ran into millions: they account for the large proportion of the heavy payments made by the British Exchequer to Northern Ireland during the period.

As regards the conditions underlying a stabilised situation in which so heavy an expenditure in connection with the machinery for the maintenance of public order is deemed indispensable—and deemed, moreover, to warrant and to require the financial assistance of Great Britain—brief indications can be adduced in the utterances of certain

responsible persons typically representative of particular bodies of opinion.

Mr. Winston Churchill spoke of the Ulster Special Constabulary to the House of Commons on 9th March, 1926, shortly after the boundary settlement:—

“The ‘B’ Specials not only gave a greater sense of security to the population of Northern Ireland as a whole, but they also gave an organised and disciplined structure within which a certain number of elements which might have proved unruly and violent found a regular and disciplined expression.” (Hansard, 9th March, 1926, Cols. 2186-7.)

This is a felicitous, if extremely frank, description. The population of Northern Ireland was divided—largely on sectarian lines—into a two-thirds majority and a one-third minority, or, roughly, 840,000 to 420,000. The Northern Ireland Constabulary, regular and special, in the days before the boundary settlement, were said to number something approaching 40,000 or not far short of five per cent of the majority, a very large proportion of its effective manhood of military age. The bulk were “specials” equipped with arms, a minimum of training and a lawful authority to dominate a disarmed minority.

As to the position of the minority in Northern Ireland during the earlier period, Mr. T. M. Healy, the Governor-General of the Irish Free State, wrote to the Secretary of State for the Colonies:—

“These problems have been rendered more acute by events which have occurred in Northern Ireland during the period which has elapsed since Article 12 of the Treaty became operative. Administrative changes have taken place, the result of which will be, after the Northern Local Government Elections of May next, practically to disfranchise the Nationalist population in large areas adjacent to the Boundary, and further similar measures are foreshadowed in the Speech from the Throne at the

opening of the Northern Parliament on the 11th instant” (Irish Free State and Northern Ireland, 15th March, 1924, Cmd. 2155).

The evidence of Mr. Joseph Devlin, M.P., is of wider range and possesses a special significance in its contrasting of the position of the minority in Northern Ireland with that of the more fortunate minority in the Irish Free State. Mr. Devlin, it is to be remembered, was a prominent surviving veteran of the old constitutionalist Irish Parliamentary Party—a Northern Catholic Nationalist who, in reliance upon the enactment of Home Rule in 1914, had led thousands of the Northern Ireland Nationalists to enlist in the British Army for the Great War. He was now speaking for the Nationalist minority, predominantly Catholic, in Northern Ireland. He said in the House of Commons at Westminster:—

“May I tell the House that a more disgraceful betrayal of a minority has never been known than the betrayal of the minority for whom I speak in this House? They want to save the minority in Southern Ireland from the majority of their fellow-countrymen. When the Free State Constitution was put into operation, one-half of the Senators in Southern Ireland created by the Free State Government belonged to the minority. There were nine judges of the High Court in Southern Ireland and five of them belonged to the minority. The largest number of chief civil servants in Southern Ireland belonged to the minority class. There never was a case where a minority was so magnanimously treated as the minority was treated in Southern Ireland.”

And again:—

“Mark you this, the minority in Southern Ireland constitute 7 per cent of the population and they get five judges out of nine, and they have all the higher places—Civil Service and official. They have received every possible advantage that any party could have with 7 per cent of the population. We in Northern Ireland

have thirty-three and a third per cent of the population, but not one of our people was appointed to the Senate: and of the judges we had not one."

And lastly, alluding to Mr. Winston Churchill, one of the signatories of the Treaty, who was in this debate seeking to deprive Ireland of the benefit of the Statute of Westminster, Mr. Devlin proceeded:—

"Why does the right hon. gentleman who is responsible for this Treaty raise his voice on behalf of the minority? Why did he not raise his voice in favour of giving thirty-three and a third per cent of the population in Northern Ireland even a tithe of representation in the Senate? After all, the respect for law and justice is determined by the purity and the freedom of the courts of justice, free from political partisanship. We have not a single Catholic judge. You gave proportional representation as a guarantee that the minority would have fair representation. That proportional representation was abolished. One would not mind it being abolished, but what did they proceed to do? They proceeded so to jerrymander the constituencies that I am returned in the Northern Parliament with 60,000 votes and one of my Unionist colleagues in an adjoining constituency is returned with 20,000 votes" (Hansard, 24th November, 1931. Cols. 335-338).

These quotations complete a brief sketch in sufficient detail of a large minority in Northern Ireland bitterly conscious of being shut off from the majority of their fellow-countrymen in the Irish Free State, and of being held in subjection to the local majority in Northern Ireland, under a nominally representative system which has been manipulated so as to deprive them of political influence and of the ordinary guarantees of civil liberty: a disarmed minority with the bulk of the manhood of the majority organised on sectarian lines and equipped against them with arms and lawful authority. Such is the sketch, but

it could be expanded and elaborated in detail on the largest scale that criticism might require.

In conditions such as these it is small cause for wonder that the cost of administration runs high—high beyond any level that the local taxpayer and Parliament find tolerable. It is high, too, because a certain lavishness in spending is a condition of its success in winning popularity with the majority, just as much as in effectively dominating the minority.

The cost of upholding the Northern Ireland Government is, in truth and effect, largely provided out of Imperial funds. Whether the Imperial funds are made available by direct payments from the British Exchequer or whether they are provided by diverting or forgoing the monies statutorily payable by Northern Ireland into the British Exchequer for Imperial purposes, the result is the same. It may be that the British Government feels responsibility for the financial welfare of the Government of Northern Ireland which remains under its tutelage. But by what casuistry can it possibly evade a corresponding responsibility for the maintenance, under its aegis and by virtue of its financial aid, of a system of political and sectarian ascendancy over a powerless minority that is fortunately unique in its history since Catholic Emancipation was enacted?

CHAPTER X

THAT WHICH IS TO COME. CONFLICT OR COLLABORATION?

THE case, on broad lines, has now been made.

Britain at the close of the Great War became embroiled in a fratricidal strife in Ireland. Victory in the world arena had been hers. The prestige which that victory had conferred had been enhanced by the new strength and confidence born of the development, under war-time conditions, of the Commonwealth of Free Nations. A new strategic position had been evolved with commitments in the European sphere and other commitments in the world sphere. Neither could be neglected; but in their divergent claims the need for far-seeing adjustments became manifest. At the zenith of her power and prestige, after taking full account of her resources and her responsibilities, with her regard concentrated upon the essential principles of her polity and the fundamental conditions of its continued success, and having taken into consultation the leading statesmen of the Commonwealth, Britain offered to Ireland, as the basis of an enduring peace, the status of a Dominion and a Treaty to assure it to her before all the world. The offer was accepted. The Treaty was made.

To-day, after fifteen years, the pressure of world happenings—in the European sphere and also in the world sphere—is constraining Britain once again to take a similar account of her strategic position, her resources and her commitments. And once again she is fain to enter into consultation with the statesmanship of the Commonwealth. The threatening masses of storm clouds gathering over the troubled horizon compel it. The importunate voice of common prudence insists that every element of weakness

or possible dislocation should be removed from the structure that may so soon be called upon to sustain the shock of the mighty and capricious forces of the impending tempest.

What of Ireland?

There is peace with the Irish Free State—peace but a state of conflict. There has been an economic war—there is still a modified economic war—waged by Britain on the Irish Free State in an effort to bend it to her will. That economic warfare, though it has failed, has caused hardship enough to breed embitterment. The Irish Free State, on its side, maintains that Britain has not fulfilled her part of the peace terms of 1921. The policy of appeasement has been forsaken in supporting partition with subsidies and in conniving at the unconstitutional subjection of the patriotic minority in the sundered area. Britain has sought, as Ireland sees it, to rob the Treaty of its full force and virtue as a Treaty. Britain has sought, too, as Ireland sees it, to deny to the Irish Free State the full rights of a Dominion as those rights have been established by the unanimous and formally recorded agreement of all the Dominions and of Britain herself. Britain has sought to enforce her purpose in these matters by the *force majeure* of her economic power. Britain has also sought to enforce her purpose by the full use of her dominating influence with the agencies for the world-wide dissemination of news and opinion to secure a publicity campaign against the Irish Free State, which is not different in kind from the efforts issuing from some of the new Ministries of Propaganda on the Continent.

Is it not time to cry "Halt" to such a conflict? Is it not time to get back to the atmosphere of the Anglo-Irish peace negotiations of 1921? If history teaches any lesson at all, it teaches that the Irish national spirit is inextinguishable and that Ireland, having sustained the rigours of armed warfare, is unlikely to succumb to the irritating pin-pricks of economic strife.

Everything is to be gained and nothing is to be lost by

peace between Britain and Ireland. There is no divergence of interest between the two countries in the European sphere nor in the world sphere. Sundered by racial and historical causes they may cherish different national aspirations, may aim at a different cultural development and may mould their progress in the light of different idealisms. But in this there is no cause for antagonism. In external politics as in external economics all their interests are complementary and not conflicting. Both are for the progress of Christian civilisation, ordered by the reign of law, inspired by the ancient traditional wisdom and avoiding the extremes that frenzied passions or hysterical appetites dictate. In an impending Great War—*quod Di avertant*—hostility between them would spell madness and ruin for both. Nor can there be a chance of this unless somebody blunders.

But between hostility and full friendship there are many gradations lying on either side of neutrality. It is urgent that all root causes of rancour and suspicion should be extirpated. It would not be well that ancient embers should be left for a chance breath of war-time passion or of enemy design to kindle into flames. There may be difficulties in what has occurred since 1921, but those difficulties should be frankly and fully met.

Peace should be consolidated while there is yet time. And the time may be very short. Success in war largely results from pre-war preparation. An Anglo-Irish peace, leading to mutual trust and collaboration, if achieved in advance, will be worth more than one victory on the battlefield after hostilities have begun. It is a condition of ultimate success.

APPENDIX

OF DOCUMENTS REFERRED TO IN THE TEXT

- I. *The Irish Free State (Agreement) Act, 1922.*
- II. *Irish Free State Constitution Act, 1922 (Session 2).*
- III. *Irish Free State (Consequential Provisions) Act, 1922
(Session 2).*
- IV. *The Statute of Westminster, 1931.*
- V. *Ireland (Confirmation of Agreement) Act, 1925.*
- VI. *The Alleged Blythe-Churchill Agreement (1926).*

APPENDIX

I

Irish Free State (Agreement) Act, 1922.

An Act to give the force of Law to certain Articles of Agreement for a Treaty between Great Britain and Ireland, and to enable effect to be given thereto, and for other purposes incidental thereto or consequential thereon. (31st March, 1922.)

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) The Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Schedule to this Act shall have the force of law as from the date of the passing of this Act.

(2) For the purpose of giving effect to Article 17 of the said Agreement, Orders in Council may be made transferring to the Provisional Government established under that Article the powers and machinery therein referred to, and as soon as may be and not later than four months after the passing of this Act the Parliament of Southern Ireland shall be dissolved and such steps shall be taken as may be necessary for holding, in accordance with the law now in force with respect to the franchise number of members and method of election and holding of elections to that Parliament, an election of members for the constituencies which would have been entitled to elect members to that Parliament, and the members so elected shall constitute the House of the Parliament to which the Provisional Government shall be responsible, and that Parliament shall, as respects matters within the jurisdiction of the Provisional Government, have power to make laws in like manner as the Parliament of the Irish Free State when constituted. Any Order in Council under this section may contain such incidental, consequential, or supplemental provisions as may appear to be necessary or proper for the purpose of giving effect to the foregoing provisions of this section.

(3) Any Order in Council made under this Act shall be laid before both Houses of Parliament as soon as may be after it is made, and if an Address is presented to His Majesty by either of those Houses within twenty-one days on which that House has sat next after any such Order is laid before it, praying that any such Order may be annulled, His Majesty may thereupon by Order in Council annul the same, and the Order so annulled shall forthwith become void, but without prejudice to the validity of any proceedings which may in the meantime have been taken thereunder; and any Order in Council made under this Act shall, subject to the foregoing provisions of this subsection be of the same effect as if enacted in this Act, but may be revoked or amended by a subsequent Order in Council:

Provided that Orders in Council under this Act shall not be deemed to be Statutory Rules within the meaning of section one of the Rules Publication Act, 1893.

(4) No writ shall be issued after the passing of this Act for the election of a member to serve in the Commons House of Parliament for a constituency in Ireland other than a constituency in Northern Ireland.

(5) This Act shall not be deemed to be the Act of Parliament for the ratification of the said Articles of Agreement as from the passing whereof the month mentioned in Article 11 of the said Articles is to run.

2. This Act may be cited as the Irish Free State (Agreement) Act, 1922.

SCHEDULE.

ARTICLES OF AGREEMENT FOR A TREATY BETWEEN GREAT BRITAIN AND IRELAND, DATED THE SIXTH DAY OF DECEMBER, NINETEEN HUNDRED AND TWENTY-ONE.

1. Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.

2. Subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament

and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State.

3. The representative of the Crown in Ireland shall be appointed in like manner as the Governor-General of Canada, and in accordance with the practice observed in the making of such appointments.

4. The oath to be taken by Members of the Parliament of the Irish Free State shall be in the following form:—

I do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established and that I will be faithful to H.M. King George V., his heirs and successors by law in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.

5. The Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions as existing at that date in such proportion as may be fair and equitable, having regard to any just claims on the part of Ireland by way of set off or counterclaim, the amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire.

6. Until an arrangement has been made between the British and Irish Governments whereby the Irish Free State undertakes her own coastal defence, the defence by sea of Great Britain and Ireland shall be undertaken by His Majesty's Imperial Forces, but this shall not prevent the construction or maintenance by the Government of the Irish Free State of such vessels as are necessary for the protection of the Revenue or the Fisheries.

The foregoing provisions of this article shall be reviewed at a conference of Representatives of the British and Irish Governments to be held at the expiration of five years from the date hereof with a view to the undertaking by Ireland of a share in her own coastal defence.

7. The Government of the Irish Free State shall afford to His Majesty's Imperial Forces:—

(a) In time of peace such harbour and other facilities as are indicated in the Annex hereto, or such other facilities as may from time to time be agreed between the British Government and the Government of the Irish Free State; and

(b) In time of war or of strained relations with a Foreign Power such harbour and other facilities as the British Government may require for the purposes of such defence as aforesaid.

8. With a view to securing the observance of the principle of international limitation of armaments, if the Government of the Irish Free State establishes and maintains a military defence force, the establishments thereof shall not exceed in size such proportion of the military establishments maintained in Great Britain as that which the population of Ireland bears to the population of Great Britain.

9. The ports of Great Britain and the Irish Free State shall be freely open to the ships of the other country on payment of the customary port and other dues.

10. The Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the Act of 1920 to judges, officials, members of police forces, and other public servants who are discharged by it or who retire in consequence of the change of government effected in pursuance hereof.

Provided that this agreement shall not apply to members of the Auxiliary Police Force or to persons recruited in Great Britain for the Royal Irish Constabulary during the two years next preceding the date hereof. The British Government will assume responsibility for such compensation or pensions as may be payable to any of these excepted persons.

11. Until the expiration of one month from the passing of the Act of Parliament for the ratification of this instrument, the powers of the Parliament and the Government of the Irish Free State shall not be exercisable as respects Northern Ireland, and the provisions of the Government of Ireland Act, 1920, shall, so far as they relate to Northern Ireland, remain of full force and effect, and no election shall be held for the return of members to serve in the Parliament of the Irish Free State for constituencies in Northern Ireland, unless a resolution is passed by both Houses of Parliament of Northern Ireland in favour of the holding of such elections before the end of the said month.

12. If before the expiration of the said month, an address is presented to His Majesty by both Houses of the Parliament of Northern Ireland to that effect, the powers of the Parliament

and Government of the Irish Free State shall no longer extend to Northern Ireland, and the provisions of the Government of Ireland Act, 1920 (including those relating to the Council of Ireland), shall so far as they relate to Northern Ireland, continue to be of full force and effect, and this instrument shall have effect subject to the necessary modifications.

Provided that if such an address is so presented a Commission consisting of three persons, one to be appointed by the Government of the Irish Free State, one to be appointed by the Government of Northern Ireland and one who shall be Chairman to be appointed by the British Government shall determine in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions the boundaries between Northern Ireland and the rest of Ireland, and for the purposes of the Government of Ireland Act, 1920, and of this instrument, the boundary of Northern Ireland shall be such as may be determined by such Commission.

13. For the purpose of the last foregoing Article, the powers of the Parliament of Southern Ireland under the Government of Ireland Act, 1920, to elect members of the Council of Ireland shall after the Parliament of the Irish Free State is constituted be exercised by that Parliament.

14. After the expiration of the said month, if no such address as is mentioned in Article 12 hereof is presented, the Parliament and Government of Northern Ireland shall continue to exercise as respects Northern Ireland the powers conferred on them by the Government of Ireland Act, 1920, but the Parliament and Government of the Irish Free State shall in Northern Ireland have in relation to matters in respect of which the Parliament of Northern Ireland has not power to make laws under that Act (including matters which under the said Act are within the jurisdiction of the Council of Ireland) the same powers as in the rest of Ireland subject to such other provisions as may be agreed in manner hereinafter appearing.

15. At any time after the date hereof the Government of Northern Ireland and the provisional Government of Southern Ireland hereinafter constituted may meet for the purpose of discussing the provisions subject to which the last foregoing Article is to operate in the event of no such address as is therein mentioned being presented, and those provisions may include:—

- (a) Safeguards with regard to patronage in Northern Ireland.
- (b) Safeguards with regard to the collection of revenue in Northern Ireland.

- (c) Safeguards with regard to import and export duties affecting the trade or industry of Northern Ireland.
- (d) Safeguards for minorities in Northern Ireland.
- (e) The settlement of the financial relations between Northern Ireland and the Irish Free State.
- (f) The establishment and powers of a local militia in Northern Ireland and the relation of the Defence Forces of the Irish Free State and of Northern Ireland respectively.

and if at any such meeting provisions are agreed to, the same shall have effect as if they were included amongst the provisions subject to which the powers of the Parliament and Government of the Irish Free State are to be exercisable in Northern Ireland under Article 14 hereof.

16. Neither the Parliament of the Irish Free State nor the Parliament of Northern Ireland shall make any law so as either directly or indirectly to endow any religion or prohibit or restrict the free exercise thereof or give any preference or impose any disability on account of religious belief or religious status or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school or make any discrimination as respects State aid between schools under the management of different religious denominations or divert from any religious denomination or any educational institution any of its property except for public utility purposes and on payment of compensation.

17. By way of provisional arrangement for the administration of Southern Ireland during the interval which must elapse between the date hereof and the constitution of a Parliament and Government of the Irish Free State in accordance therewith, steps shall be taken forthwith for summoning a meeting of members of Parliament elected for constituencies in Southern Ireland since the passing of the Government of Ireland Act, 1920, and for constituting a provisional Government, and the British Government shall take the steps necessary to transfer to such provisional Government the powers and machinery requisite for the discharge of its duties, provided that every member of such provisional Government shall have signified in writing his or her acceptance of this instrument. But this arrangement shall not continue in force beyond the expiration of twelve months from the date hereof.

18. This instrument shall be submitted forthwith by His Majesty's Government for the approval of Parliament and by the Irish signatories to a meeting summoned for the purpose of

the members elected to sit in the House of Commons of Southern Ireland, and if approved shall be ratified by the necessary legislation.

(Signed)

On behalf of the British
Delegation,

D. LLOYD GEORGE.
AUSTEN CHAMBERLAIN.
BIRKENHEAD.
WINSTON CHURCHILL.
L. WORTHINGTON-EVANS.
HAMAR GREENWOOD.
GORDON HEWART.

On behalf of the Irish
Delegation,

ART. Ó GRIOBHTHA.
(ARTHUR GRIFFITH).
MICHÁL Ó COILEAIN.
RÍOBÁRD BARTUN.
E. S. Ó DUGAIN.
SEORSA GHABHÁIN Uí
DHUBHTHAIGH.

6th December, 1921.

ANNEX

1. The following are the specific facilities required.

DOCKYARD PORT AT BEREHAVEN

(a) Admiralty property and rights to be retained as at the date hereof. Harbour defences to remain in charge of British care and maintenance parties.

QUEENSTOWN

(b) Harbour defences to remain in charge of British care and maintenance parties. Certain mooring buoys to be retained for use of His Majesty's ships.

BELFAST LOUGH

(c) Harbour defences to remain in charge of British care and maintenance parties.

LOUGH SWILLY

(d) Harbour defences to remain in charge of British care and maintenance parties.

AVIATION

(e) Facilities in the neighbourhood of the above ports for coastal defence by air.

OIL FUEL STORAGE

- | | | | |
|-----------------|---|---|---|
| (f) Haulbowline | — | { | To be offered for sale to commercial companies under guarantee that purchasers shall maintain a certain minimum stock for Admiralty purposes. |
| Rathmullen | — | | |

2. A convention shall be made between the British Government and the Government of the Irish Free State to give effect to the following conditions:—

- (a) That submarine cables shall not be landed or wireless stations for communication with places outside Ireland be established except by agreement with the British Government; that the existing cable landing rights and wireless concessions shall not be withdrawn except by agreement with the British Government; and that the British Government shall be entitled to land additional submarine cables or establish additional wireless stations for communication with places outside Ireland:
 - (b) That lighthouses, buoys, beacons, and any navigational marks or navigational aids shall be maintained by the Government of the Irish Free State as at the date hereof and shall not be removed or added to except by agreement with the British Government:
 - (c) The war signal stations shall be closed down and left in charge of care and maintenance parties, the Government of the Irish Free State being offered the option of taking them over and working them for commercial purposes subject to Admiralty inspection and guaranteeing the upkeep of existing telegraphic communication therewith.
3. A Convention shall be made between the same Governments for the regulation of Civil Communication by Air.
- | | |
|----------|----------|
| D. L. G. | M. O. C. |
| A. C. | |
| B. | |
| W. S. C. | |

II

Irish Free State Constitution Act, 1922. (Session 2)

An Act to provide for the Constitution of the Irish Free State.
(5th December, 1922.)

Whereas the House of the Parliament constituted pursuant to the Irish Free State (Agreement) Act, 1922, sitting as a Constituent Assembly for the settlement of the Constitution of the Irish Free State, has passed the Measure (hereinafter referred to as "the Constituent Act") set forth in the Schedule of this Act, whereby the Constitution appearing as the First Schedule to the Constituent Act is declared to be the Constitution of the Irish Free State:

And whereas by the Constituent Act the said Constitution is made subject to the following provisions, namely:—

"The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as the Scheduled Treaty) which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty."

And whereas by Article seventy-four of the said Constitution provision is made for the continuance within the Irish Free State of existing taxation in respect of the current present financial year and any preceding financial year, and in respect of any period ending or occasion happening within those years, and it is expedient to make a corresponding provision with respect to taxation within the rest of the United Kingdom:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. The Constitution set forth in the First Schedule to the Constituent Act shall, subject to the provisions to which the same is by the Constituent Act so made subject as aforesaid, be

the Constitution of the Irish Free State, and shall come into operation on the same being proclaimed by His Majesty in accordance with Article eighty-three of the said Constitution, but His Majesty may at any time after the proclamation appoint a Governor-General for the Irish Free State.

2.—(1) In relation to taxes and duties, so far as leviable outside the Irish Free State, the following provisions shall have effect:—

- (a) The establishment of the Irish Free State shall not affect any liability to pay any tax or duty payable in respect of the current or any preceding financial year, or in respect of any period ending on or before the last day of the current financial year, or payable on any occasion happening within the current or any preceding financial year, or the amount of such liability, and all such taxes and duties as aforesaid and arrears thereof shall continue to be assessed, levied, and collected and all payments and allowances of such taxes and duties shall continue to be made in like manner in all respects as immediately before the establishment of the Irish Free State, subject to the like adjustments of the proceeds collected as were theretofore applicable.
- (b) Goods transported during the current financial year from or to the Irish Free State to or from any other part of the United Kingdom or the Isle of Man shall not, except in respect of the forms to be used and the information to be furnished, be treated as goods imported or exported as the case may be.

(2) If an arrangement is made with the Irish Free State for an extension of the provisions of this section as respects all or any taxes and duties to the next ensuing financial year or any part thereof, it shall be lawful for His Majesty, if a resolution to that effect is passed by the Commons House of Parliament, by Order in Council to extend the provisions of this section so as to apply, in the case of the taxes and duties to which the arrangement relates, in respect to the next ensuing financial year or part thereof in like manner as it applies in respect to the current financial year.

(3) For the purposes of this section, the expression “financial year” means, as respects income tax (including super-tax), the year of assessment, and as respects other taxes and duties, the year ending on the thirty-first day of March.

3. If the Parliament of the Irish Free State make provision to that effect, any Act passed before the passing of this Act

which applies to or may be applied to self-governing Dominions, whether alone or to such Dominions and other parts of His Majesty's Dominions, shall apply or may be applied to the Irish Free State in like manner as it applies or may be applied to self-governing Dominions.

4. Nothing in the said Constitution shall be construed as prejudicing the power of Parliament to make laws affecting the Irish Free State in any case where, in accordance with constitutional practice, Parliament would make laws affecting other self-governing Dominions.

5. This Act may be cited as the Irish Free State Constitution Act, 1922 (Session 2), and shall be deemed to be the Act of Parliament for the ratification of the said Articles of Agreement as from the passing whereof the month mentioned in Article eleven of the said Articles is to run.

SCHEDULE

CONSTITUENT ACT

DÁIL EIREANN sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in the confidence that the National life and unity of Ireland shall thus be restored, hereby proclaims the establishment of The Irish Free State (otherwise called Saorstát Eireann) and in the exercise of undoubted right, decrees and enacts as follows:—

1. The Constitution set forth in the First Schedule hereto annexed shall be the Constitution of The Irish Free State (Saorstát Eireann).

2. The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as "the Scheduled Treaty") which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State (Saorstát Eireann) shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty.

3. This Act may be cited for all purposes as the Constitution of The Irish Free State (Saorstát Eireann) Act, 1922.

CONSTITUTION OF THE IRISH FREE STATE
(SAORSTÁT EIREANN)

FIRST SCHEDULE ABOVE REFERRED TO

Article 1

The Irish Free State (otherwise hereinafter called or sometimes called Saorstát Eireann) is co-equal a member of the Community of Nations forming the British Commonwealth of Nations.

Article 2

All powers of government and all authority legislative, executive, and judicial in Ireland, are derived from the people of Ireland and the same shall be exercised in the Irish Free State (Saorstát Eireann) through the organisations established by or under, and in accord with, this Constitution.

Article 3

Every person, without distinction of sex, domiciled in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) at the time of the coming into operation of this Constitution who was born in Ireland or either of whose parents was born in Ireland or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) for not less than seven years, is a citizen of the Irish Free State (Saorstát Eireann) and shall within the limits of the jurisdiction of the Irish Free State (Saorstát Eireann) enjoy the privileges and be subject to the obligations of such citizenship: Provided that any such person being a citizen of another State may elect not to accept the citizenship hereby conferred; and the conditions governing the future acquisition and termination of citizenship in the Irish Free State (Saorstát Eireann) shall be determined by law.

Article 4

The National language of the Irish Free State (Saorstát Eireann) is the Irish language, but the English language shall be equally recognised as an official language. Nothing in this Article shall prevent special provisions being made by the Parliament of the Irish Free State (otherwise called and herein generally referred to as the "Oireachtas") for districts or areas in which only one language is in general use.

Article 5

No title of honour in respect of any services rendered in or in relation to the Irish Free State (Saorstát Eireann) may be conferred on any citizen of the Irish Free State (Saorstát Eireann) except with the approval or upon the advice of the Executive Council of the State.

Article 6

The liberty of the person is inviolable, and no person shall be deprived of his liberty except in accordance with law. Upon complaint made by or on behalf of any person that he is being unlawfully detained, the High Court and any and every judge thereof shall forthwith enquire into the same and may make an order requiring the person in whose custody such person shall be detained to produce the body of the person so detained before such Court or judge without delay and to certify in writing as to the cause of the detention and such Court or judge shall thereupon order the release of such person unless satisfied that he is being detained in accordance with the law:

Provided, however, that nothing in this Article contained shall be invoked to prohibit control or interfere with any act of the military forces of the Irish Free State (Saorstát Eireann) during the existence of a state of war or armed rebellion.

Article 7

The dwelling of each citizen is inviolable and shall not be forcibly entered except in accordance with law.

Article 8

Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be made either directly or indirectly to endow any religion, or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects State aid between schools under the management of different religious denominations, or divert from any religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water or drainage works or other works of public utility, and on payment of compensation.

Article 9

The right of free expression of opinion as well as the right to assemble peaceably and without arms, and to form associations or unions is guaranteed for purposes not opposed to public morality. Laws regulating the manner in which the right of forming associations and the right to free assembly may be exercised shall contain no political, religious or class distinction.

Article 10

All citizens of the Irish Free State (Saorstát Éireann) have the right to free elementary education.

Article 11

All the lands and waters, mines and minerals, within the territory of the Irish Free State (Saorstát Éireann) hitherto vested in the State, or any department thereof, or held for the public use or benefit, and also all the natural resources of the same territory (including the air and all forms of potential energy), and also all royalties and franchises within that territory shall, from and after the date of the coming into operation of this Constitution, belong to the Irish Free State (Saorstát Éireann), subject to any trusts, grants, leases or concessions then existing in respect thereof, or any valid private interest therein, and shall be controlled and administered by the Oireachtas, in accordance with such regulations and provisions as shall be from time to time approved by legislation, but the same shall not, nor shall any part thereof, be alienated, but may in the public interest be from time to time granted by way of lease or licence to be worked or enjoyed under the authority and subject to the control of the Oireachtas: Provided that no such lease or licence may be made for a term exceeding ninety-nine years, beginning from the date thereof, and no such lease or licence may be renewable by the terms thereof.

Article 12

A Legislature is hereby created to be known as the Oireachtas. It shall consist of the King and two Houses, the Chamber of Deputies (otherwise called and herein generally referred to as "Dáil Éireann") and the Senate (otherwise called and herein generally referred to as "Seanad Éireann"). The sole and exclusive power of making laws for the peace, order and good government of the Irish Free State (Saorstát Éireann) is vested in the Oireachtas.

Article 13

The Oireachtas shall sit in or near the city of Dublin or in such other place as from time to time it may determine.

Article 14

All citizens of the Irish Free State (Saorstát Eireann) without distinction of sex, who have reached the age of twenty-one years and who comply with the provisions of the prevailing electoral laws, shall have the right to vote for members of Dáil Eireann, and to take part in the Referendum and Initiative. All citizens of the Irish Free State (Saorstát Eireann) without distinction of sex who have reached the age of thirty years and who comply with the provisions of the prevailing electoral laws, shall have the right to vote for members of Seanad Eireann. No voter may exercise more than one vote at an election to either House and the voting shall be by secret ballot. The mode and place of exercising this right shall be determined by law.

Article 15

Every citizen who has reached the age of twenty-one years and who is not placed under disability or incapacity by the Constitution or by law shall be eligible to become a member of Dáil Eireann.

Article 16

No person may be at the same time a member both of Dáil Eireann and of Seanad Eireann and if any person who is already a member of either House is elected to be a member of the other House, he shall forthwith be deemed to have vacated his first seat.

Article 17

The oath to be taken by members of the Oireachtas shall be in the following form:—

I.....do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established, and that I will be faithful to H.M. King George V, his heirs and successors by law in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations. Such oath shall be taken and subscribed by every member of the Oireachtas before taking his seat therein before the

Representative of the Crown or some person authorised by him.

Article 18

Every member of the Oireachtas shall, except in case of treason, felony, or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of either House, and shall not, in respect of any utterance in either House, be amenable to any action or proceeding in any Court other than the House itself.

Article 19

All official reports and publications of the Oireachtas or of either House thereof shall be privileged and utterances made in either House wherever published shall be privileged.

Article 20

Each House shall make its own Rules and Standing Orders, with power to attach penalties for their infringement and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.

Article 21

Each House shall elect its own Chairman and Deputy Chairman and shall prescribe their powers, duties, remunerations, and terms of office.

Article 22

All matters in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present other than the Chairman or presiding member, who shall have and exercise a casting vote in the case of an equality of votes. The number of members necessary to constitute a meeting of either House for the exercise of its powers shall be determined by its Standing Orders.

Article 23

The Oireachtas shall make provision for the payment of its members and may in addition provide them with free travelling facilities in any part of Ireland.

Article 24

The Oireachtas shall hold at least one session each year. The Oireachtas shall be summoned and dissolved by the Representative of the Crown in the name of the King and subject as aforesaid Dáil Eireann shall fix the date of re-assembly of the Oireachtas and the date of the conclusion of the session of each House: Provided that the sessions of Seanad Eireann shall not be concluded without its own consent.

Article 25

Sittings of each House of the Oireachtas shall be public. In cases of special emergency either House may hold a private sitting with the assent of two-thirds of the members present.

Article 26

Dáil Eireann shall be composed of members who represent constituencies determined by law. The number of members shall be fixed from time to time by the Oireachtas, but the total number of members of Dáil Eireann (exclusive of members for the Universities) shall not be fixed at less than one member for each thirty thousand of the population, or at more than one member for each twenty thousand of the population: Provided that the proportion between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as possible, be identical throughout the country. The members shall be elected upon principles of Proportional Representation. The Oireachtas shall revise the constituencies at least once in every ten years, with due regard to changes in distribution of the population, but any alterations in the constituencies shall not take effect during the life of Dáil Eireann sitting when such revision is made.

Article 27

Each University in the Irish Free State (Saorstát Eireann) which was in existence at the date of the coming into operation of this Constitution, shall be entitled to elect three representatives to Dáil Eireann upon a franchise and in a manner to be prescribed by law.

Article 28

At a General Election for Dáil Eireann the polls (exclusive of those for members for the Universities) shall be held on the same day throughout the country, and that day shall be a day

not later than thirty days after the date of the dissolution and shall be proclaimed a public holiday. Dáil Eireann shall meet within one month of such day, and shall unless earlier dissolved continue for four years from the date of its first meeting, and not longer. Dáil Eireann may not at any time be dissolved except on the advice of the Executive Council.

Article 29

In case of death, resignation or disqualification of a member of Dáil Eireann, the vacancy shall be filled by election in manner to be determined by law.

Article 30

Seanad Eireann shall be composed of citizens who shall be proposed on the grounds that they have done honour to the Nation by reason of useful public service or that, because of special qualifications or attainments, they represent important aspects of the Nation's life.

Article 31

The number of members of Seanad Eireann shall be sixty. A citizen to be eligible for membership of Seanad Eireann must be a person eligible to become a member of Dáil Eireann, and must have reached the age of thirty-five years. Subject to any provision for the constitution of the first Seanad Eireann the term of office of a member of Seanad Eireann shall be twelve years.

Article 32

One-fourth of the members of Seanad Eireann shall be elected every three years from a panel constituted as hereinafter mentioned at an election at which the area of the jurisdiction of the Irish Free State (Saorstát Eireann) shall form one electoral area, and the elections shall be held on principles of Proportional Representation.

Article 33

Before each election of members of Seanad Eireann a panel shall be formed consisting of:—

(a) Three times as many qualified persons as there are members to be elected, of whom two-thirds shall be nominated by Dáil Eireann voting according to principles of Proportional Representation and one-third shall be nominated by

Seanad Éireann voting according to principles of Proportional Representation; and

(b) Such persons who have at any time been members of Seanad Éireann (including members about to retire) as signify by notice in writing addressed to the President of the Executive Council their desire to be included in the panel.

The method of proposal and selection for nomination shall be decided by Dáil Éireann and Seanad Éireann respectively, with special reference to the necessity for arranging for the representation of important interests and institutions in the country: Provided that each proposal shall be in writing and shall state the qualifications of the person proposed and that no person shall be proposed without his own consent. As soon as the panel has been formed a list of the names of the members of the panel arranged in alphabetical order with their qualifications shall be published.

Article 34

In case of the death, resignation or disqualification of a member of the Seanad Éireann his place shall be filled by a vote of Seanad Éireann. Any member of Seanad Éireann so chosen shall retire from office at the conclusion of the three years period then running and the vacancy thus created shall be additional to the places to be filled under Article 32 of this Constitution. The term of office of the members chosen at the election after the first fifteen elected shall conclude at the end of the period or periods at which the member or members of Seanad Éireann, by whose death or withdrawal the vacancy or vacancies was or were originally created, would be due to retire: Provided that the sixteenth member shall be deemed to have filled the vacancy first created in order of time and so on.

Article 35

Dáil Éireann shall in relation to the subject matter of Money Bills as hereinafter defined have legislative authority exclusive of Seanad Éireann.

A Money Bill means a Bill which contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on public moneys or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; subordinate

matters incidental to those subjects or any of them. In this definition the expression "taxation," "public money" and "loan" respectively do not include any taxation, money or loan raised by local authorities or bodies for local purposes.

The Chairman of Dáil Eireann shall certify any Bill which in his opinion is a Money Bill to be a Money Bill, but, if within three days after a Bill has been passed by Dáil Eireann, two-fifths of the members of either House by notice in writing addressed to the Chairman of the House of which they are members so require, the question whether the Bill is or is not a Money Bill shall be referred to a Committee of Privileges consisting of three members elected by each House with a Chairman who shall be the senior judge of the Supreme Court able and willing to act, and who, in the case of an equality of votes, but not otherwise, shall be entitled to vote. The decision of the Committee on the question shall be final and conclusive.

Article 36

Dáil Eireann shall as soon as possible after the commencement of each financial year consider the Estimates of receipts and expenditure of the Irish Free State (Saorstát Eireann) for that year, and, save in so far as may be provided by specific enactment in each case, the legislation required to give effect to the financial Resolutions of each year shall be enacted within that year.

Article 37

Money shall not be appropriated by vote, resolution or law, unless the purpose of the appropriation has in the same session been recommended by a message from the Representative of the Crown acting on the advice of the Executive Council.

Article 38

Every Bill initiated in and passed by Dáil Eireann shall be sent to Seanad Eireann and may, unless it be a Money Bill, be amended in Seanad Eireann and Dáil Eireann shall consider any such amendment; but a Bill passed by Dáil Eireann and considered by Seanad Eireann shall, not later than two hundred and seventy days after it shall have been first sent to Seanad Eireann, or such longer period as may be agreed upon by the two Houses, be deemed to be passed by both Houses in the form in which it was last passed by Dáil Eireann: Provided that every Money Bill shall be sent to Seanad Eireann for its recommendations and at a period not longer than twenty-one days after it

shall have been sent to Seanad Éireann, it shall be returned to Dáil Éireann which may pass it, accepting or rejecting all or any of the recommendations of Seanad Éireann, and as so passed or if not returned within such period of twenty-one days shall be deemed to have been passed by both Houses. When a Bill other than a Money Bill has been sent to Seanad Éireann a Joint Sitting of the Members of both Houses may on a resolution passed by Seanad Éireann be convened for the purpose of debating, but not of voting upon, the proposals of the Bill or any amendment of the same.

Article 39

A Bill may be initiated in Seanad Éireann and if passed by Seanad Éireann shall be introduced into Dáil Éireann. If amended by Dáil Éireann the Bill shall be considered as a Bill initiated in Dáil Éireann. If rejected by Dáil Éireann it shall not be introduced again in the same session, but Dail Éireann may reconsider it on its own motion.

Article 40

A Bill passed by either House and accepted by the other House shall be deemed to be passed by both Houses.

Article 41

So soon as any Bill shall have been passed or deemed to have been passed by both Houses, the Executive Council shall present the same to the Representative of the Crown for the signification by him, in the King's name, of the King's assent, and such Representative may withhold the King's assent or reserve the Bill for the signification of the King's pleasure: Provided that the Representative of the Crown shall in the withholding of such assent to or the reservation of any Bill, act in accordance with the law, practice, and constitutional usage governing the like withholding of assent or reservation in the Dominion of Canada.

A Bill reserved for the signification of the King's Pleasure shall not have any force unless and until within one year from the day on which it was presented to the Representative of the Crown for the King's Assent, the Representative of the Crown signifies by speech or message to each of the Houses of the Oireachtas, or by proclamation, that it has received the Assent of the King in Council.

An entry of every such speech, message or proclamation shall be made in the Journal of each House and a duplicate thereof

duly attested shall be delivered to the proper officer to be kept among the Records of the Irish Free State (Saorstát Eireann).

Article 42

As soon as may be after any law has received the King's assent, the clerk, or such officer as Dáil Eireann may appoint for the purpose, shall cause two fair copies of such law to be made, one being in the Irish language and the other in the English language (one of which copies shall be signed by the Representative of the Crown to be enrolled for record in the office of such officer of the Supreme Court as Dáil Eireann may determine), and such copies shall be conclusive evidence as the provisions of every such law, and in case of conflict between the two copies so deposited, that signed by the Representative of the Crown shall prevail.

Article 43

The Oireachtas shall have no power to declare acts to be infringements of the law which were not so at the date of their commission.

Article 44

The Oireachtas may create subordinate legislatures with such powers as may be decided by law.

Article 45

The Oireachtas may provide for the establishment of Functional or Vocational Councils representing branches of the social and economic life of the Nation. A law establishing any such Council shall determine its powers, rights and duties, and its relation to the Government of the Irish Free State (Saorstát Eireann).

Article 46

The Oireachtas has the exclusive right to regulate the raising and maintaining of such armed forces as are mentioned in the Scheduled Treaty in the territory of the Irish Free State (Saorstát Eireann) and every such force shall be subject to the control of the Oireachtas.

Article 47

Any Bill passed or deemed to have been passed by both Houses may be suspended for a period of ninety days on the

written demand of two-fifths of the members of Dáil Éireann or of a majority of the members of Seanad Éireann presented to the President of the Executive Council not later than seven days from the day on which such Bill shall have been so passed or deemed to have been passed. Such a Bill shall, in accordance with regulations to be made by the Oireachtas be submitted by Referendum to the decision of the people if demanded before the expiration of the ninety days either by a resolution of Seanad Éireann assented to by three-fifths of the members of Seanad Éireann, or by a petition signed by not less than one-twentieth of the voters then on the register of voters, and the decision of the people by a majority of the votes recorded on such Referendum shall be conclusive. These provisions shall not apply to Money Bills or to such Bills as shall be declared by both Houses to be necessary for the immediate preservation of the public peace, health or safety.

Article 48

The Oireachtas may provide for the Initiation by the people of proposals for laws or constitutional amendments. Should the Oireachtas fail to make such provision within two years, it shall on the petition of not less than seventy-five thousand voters on the register, of whom not more than fifteen thousand shall be voters in any one constituency, either make such provisions or submit the question to the people for decision in accordance with the ordinary regulations governing the Referendum. Any legislation passed by the Oireachtas providing for such Initiation by the people shall provide (1) that such proposals may be initiated on a petition of fifty thousand voters on the register, (2) that if the Oireachtas rejects a proposal so initiated it shall be submitted to the people for decision in accordance with the ordinary regulations governing the Referendum; and (3) that if the Oireachtas enacts a proposal so initiated, such enactment shall be subject to the provisions respecting ordinary legislation or amendments of the Constitution as the case may be.

Article 49

Save in the case of actual invasion, the Irish Free State (Saorstát Éireann) shall not be committed to active participation in any war without the assent of the Oireachtas.

Article 50

Amendments of this Constitution within the terms of the Scheduled Treaty may be made by the Oireachtas, but no such

amendment, passed by both Houses of the Oireachtas, after the expiration of a period of eight years from the date of the coming into operation of this Constitution, shall become law, unless the same shall, after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas, have been submitted to a Referendum of the people, and unless a majority of the voters on the register shall have recorded their votes on such Referendum, and either the votes of a majority of the voters on the register, or two-thirds of the votes recorded, shall have been cast in favour of such amendment. Any such amendment may be made within the said period of eight years by way of ordinary legislation and as such shall be subject to the provisions of Article 47 hereof.

Article 51

The Executive Authority of the Irish Free State (Saorstát Éireann) is hereby declared to be vested in the King, and shall be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada, by the Representative of the Crown. There shall be a Council to aid and advise in the government of the Irish Free State (Saorstát Éireann) to be styled the Executive Council. The Executive Council shall be responsible to the Dáil Éireann, and shall consist of not more than seven nor less than five Ministers appointed by the Representative of the Crown on the nomination of the President of the Executive Council.

Article 52

Those Ministers who form the Executive Council shall all be members of Dáil Éireann and shall include the President of the Council, the Vice-President of the Council and the Minister in charge of the Department of Finance.

Article 53

The President of the Council shall be appointed on the nomination of Dáil Éireann. He shall nominate a Vice-President of the Council, who shall act for all purposes in the place of the President, if the President shall die, resign, or be permanently incapacitated, until a new President of the Council shall have been elected. The Vice-President shall also act in the place of the President during his temporary absence. The

other Ministers who are to hold office as members of the Executive Council shall be appointed on the nomination of the President, with the assent of Dáil Eireann, and he and the Ministers nominated by him shall retire from office should he cease to retain the support of a majority in Dáil Eireann, but the President and such Ministers shall continue to carry on their duties until their successors shall have been appointed: Provided, however, that the Oireachtas shall not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority in Dáil Eireann.

Article 54

The Executive Council shall be collectively responsible for all matters concerning the Departments of State administered by Members of the Executive Council. The Executive Council shall prepare Estimates of the receipts and expenditure of the Irish Free State (Saorstát Eireann) for each financial year, and shall present them to Dáil Eireann before the close of the previous financial year. The Executive Council shall meet and act as a collective authority.

Article 55

Ministers who shall not be members of the Executive Council may be appointed by the Representative of the Crown and shall comply with the provisions of Article 17 of this Constitution. Every such Minister shall be nominated by Dáil Eireann on the recommendation of a Committee of Dáil Eireann chosen by a method to be determined by Dáil Eireann, so as to be impartially representative of Dáil Eireann. Should a recommendation not be acceptable to Dáil Eireann, the Committee may continue to recommend names until one is found acceptable. The total number of Ministers, including the Ministers of the Executive Council, shall not exceed twelve.

Article 56

Every Minister who is not a member of the Executive Council shall be the responsible head of the Department or Departments under his charge, and shall be individually responsible to Dáil Eireann alone for the administration of the Department or Departments of which he is the head: Provided that should arrangements for Functional or Vocational Councils be made by the Oireachtas these Ministers or any of them may, should the Oireachtas so decide, be members of, and be recommended to

Dáil Eireann by, 'such Councils. The term of office of any Minister, not a member of the Executive Council, shall be the term of Dáil Eireann existing at the time of his appointment, but he shall continue in office until his successor shall have been appointed, and no such Minister shall be removed from office during his term otherwise than by Dáil Eireann itself, and by them for stated reasons, and after the proposal to remove him has been submitted to a Committee, chosen by a method to be determined by Dáil Eireann, so as to be impartially representative of Dáil Eireann, and the Committee has reported thereon.

Article 57

Every Minister shall have the right to attend and be heard in Seanad Eireann.

Article 58

The appointment of a member of Dáil Eireann to be a Minister shall not entail upon him any obligation to resign his seat or to submit himself for re-election.

Article 59

Ministers shall receive such remuneration as may from time to time be prescribed by law, but the remuneration of any Minister shall not be diminished during his term of office.

Article 60

The Representative of the Crown, who shall be styled the Governor-General of the Irish Free State (Saorstát Eireann) shall be appointed in like manner as the Governor-General of Canada and in accordance with the practice observed in the making of such appointments. His salary shall be of the like amount as that now payable to the Governor-General of the Commonwealth of Australia and shall be charged on the public funds of the Irish Free State (Saorstát Eireann) and suitable provision shall be made out of those funds for the maintenance of his official residence and establishment.

Article 61

All revenues of the Irish Free State (Saorstát Eireann) from whatever source arising, shall, subject to such exception as may be provided by law, form one fund, and shall be appropriated for the purposes of the Irish Free State (Saorstát Eireann) in the

manner and subject to the charges and liabilities imposed by law.

Article 62

Dáil Eireann shall appoint a Comptroller and Auditor-General to act on behalf of the Irish Free State (Saorstát Eireann). He shall control all disbursements and shall audit all accounts of moneys administered by or under the authority of the Oireachtas and shall report to Dáil Eireann at stated periods to be determined by law.

Article 63

The Comptroller and Auditor-General shall not be removed except for stated misbehaviour or incapacity on resolutions passed by Dáil Eireann and Seanad Eireann. Subject to this provision the terms and conditions of his tenure of office shall be fixed by law. He shall not be a member of the Oireachtas nor shall he hold any other office or position of emolument.

Article 64

The judicial power of the Irish Free State (Saorstát Eireann) shall be exercised and justice administered in the public Courts established by the Oireachtas by judges appointed in manner hereinafter provided. These Courts shall comprise Courts of First Instance and a Court of Final Appeal to be called the Supreme Court. The Courts of First Instance shall include a High Court, invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal, and also Courts of local and limited jurisdiction with a right of appeal as determined by law.

Article 65

The judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution. In all cases in which such matters shall come into question, the High Court alone shall exercise original jurisdiction.

Article 66

The Supreme Court of the Irish Free State (Saorstát Eireann) shall, with such exceptions (not including cases which involve

questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever.

Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave.

Article 67

The number of judges, the constitution and organisation of, and distribution of business and jurisdiction among, the said Courts and judges, and all matters of procedure shall be as prescribed by the laws for the time being in force and the regulations made thereunder.

Article 68

The judges of the Supreme Court and of the High Court and of all other Courts established in pursuance of this Constitution shall be appointed by the Representative of the Crown on the advice of the Executive Council. The judges of the Supreme Court and of the High Court shall not be removed except for stated misbehaviour or incapacity, and then only by resolutions passed by both Dáil Éireann and Seanad Éireann. The age of retirement, and the remuneration and the pension of such judges on retirement and the declarations to be taken by them on appointment shall be prescribed by law. Such remuneration may not be diminished during their continuance in office. The terms of appointment of the judges of such other courts as may be created shall be prescribed by law.

Article 69

All judges shall be independent in the exercise of their functions, and subject only to the Constitution and the law. A judge shall not be eligible to sit in the Oireachtas, and shall not hold any other office or position of emolument.

Article 70

No one shall be tried save in due course of law and extraordinary courts shall not be established, save only such Military

Tribunals as may be authorised by law for dealing with military offenders against military law. The jurisdiction of Military Tribunals shall not be extended to or exercised over the civil population save in time of war, or armed rebellion, and for acts committed in time of war or armed rebellion, and in accordance with the regulations to be prescribed by law. Such jurisdiction shall not be exercised in any area in which all civil courts are open or capable of being held, and no person shall be removed from one area to another for the purpose of creating such jurisdiction.

Article 71

A member of the armed forces of the Irish Free State (Saorstát Éireann) not on the active service shall not be tried by any Court Martial or other Military Tribunal for an offence cognisable by the Civil Courts, unless such offence shall have been brought expressly within the jurisdiction of Courts Martial or other Military Tribunal by any code of laws or regulations for the enforcement of military discipline which may be hereafter approved by the Oireachtas.

Article 72

No person shall be tried on any criminal charge without a jury save in the case of charges in respect of minor offences triable by law before a Court of Summary Jurisdiction and in the case of charges for offences against military law triable by Court Martial or other Military Tribunal.

TRANSITORY PROVISIONS

Article 73

Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Éireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.

Article 74

Nothing in this Constitution shall affect any liability to pay any tax or duty payable in respect of the financial year current

at the date of the coming into operation of this Constitution or any preceding financial year, or in respect of any period ending on or before the last day of the said current financial year, or payable on any occasion happening within that or any preceding year, or the amount of such liability; and during the said current financial year all taxes and duties and arrears thereof shall continue to be assessed, levied and collected in like manner in all respects as immediately before this Constitution came into operation, subject to the like adjustments of the proceeds collected as were theretofore applicable; and for that purpose the Executive Council shall have the like powers and be subject to the like liabilities as the Provisional Government.

Goods transported during the said current financial year from or to the Irish Free State (Saorstát Éireann) to or from any part of Great Britain or the Isle of Man shall not, except so far as the Executive Council may otherwise direct, in respect of the forms to be used and the information to be furnished, be treated as goods exported or imported as the case may be.

For the purpose of this Article, the expression "financial year" means, as respects income tax (including super-tax), the year of assessment, and as respects other taxes and duties, the year ending on the thirty-first day of March.

Article 75

Until Courts have been established for the Irish Free State (Saorstát Éireann) in accordance with this Constitution, the Supreme Court of Judicature, County Courts, Courts of Quarter Sessions and Courts of Summary Jurisdiction, as at present existing, shall for the time being continue to exercise the same jurisdiction as heretofore, and any judge or justice, being a member of any such Court, holding office at the time when this Constitution comes into operation, shall for the time being continue to be a member thereof and hold office by the like tenure and upon the like terms as heretofore, unless, in the case of a judge of the said Supreme Court or of a County Court, he signifies to the Representative of the Crown his desire to resign. Any vacancies in any of the said Courts so continued may be filled by appointment made in like manner as appointments to judgeships in the Courts established under this Constitution:

Provided that the provisions of Article 66 of this Constitution as to the decisions of the Supreme Court established under this Constitution shall apply to decisions of the Court of Appeal continued by this Article.

Article 76

If any judge of the said Supreme Court of Judicature or of any of the said County Courts on the establishment of Courts under this Constitution, is not with his consent appointed to be a judge of any such Court, he shall, for the purpose of Article 10 of the Scheduled Treaty, be treated as if he had retired in consequence of the change of Government effected in pursuance of the said Treaty, but the rights so conferred shall be without prejudice to any rights or claims that he may have against the British Government.

Article 77

Every existing officer of the Provisional Government at the date of the coming into operation of this Constitution (not being an officer whose services have been lent by the British Government to the Provisional Government) shall on that date be transferred to and become an officer of the Irish Free State (Saorstát Eireann), and shall hold office by a tenure corresponding to his previous tenure.

Article 78

Every such existing officer who was transferred from the British Government by virtue of any transfer of services to the Provisional Government shall be entitled to the benefit of Article 10 of the Scheduled Treaty.

Article 79

The transfer of the administration of any public service, the administration of which was not before the date of the coming into operation of this Constitution transferred to the Provisional Government, shall be deferred until the 31st day of March, 1923, or such earlier date as may, after one month's previous notice in the Official Gazette, be fixed by the Executive Council; and such of the officers engaged in the administration of those services at the date of transfer, as may be determined in the manner hereinafter appearing, shall be transferred to and become officers of the Irish Free State (Saorstát Eireann): and Article 77 of this Constitution shall apply as if such officers were existing officers of the Provisional Government who had been transferred to that Government from the British Government. The officers to be so transferred in respect of any services shall be determined in like manner as if the administration of the services had before the coming into operation of the Constitution been transferred to the Provisional Government.

Article 80

As respects departmental property, assets, rights and liabilities, the Government of the Irish Free State (Saorstát Éireann) shall be regarded as the successors of the Provisional Government, and, to the extent to which functions of any department of the British Government become functions of the Government of the Irish Free State (Saorstát Éireann), as the successors of such department of the British Government.

Article 81

After the date on which this constitution comes into operation the House of the Parliament elected in pursuance of the Irish Free State (Agreement) Act, 1922 (being the constituent assembly for the settlement of this Constitution), may, for a period not exceeding one year from that date, but subject to compliance by the Members thereof with the provisions of Article 17 of this Constitution, exercise all the powers and authorities conferred on Dáil Éireann by this Constitution, and the first election for Dáil Éireann under Articles 26, 27 and 28 hereof shall take place as soon as possible after the expiration of such period.

Article 82

Notwithstanding anything contained in Articles 14 and 33 hereof, the first Seanad Éireann shall be constituted immediately after the coming into operation of this Constitution in the manner following, that is to say:—

- (a) The first Seanad Éireann shall consist of sixty members, of whom thirty shall be elected and thirty shall be nominated.
- (b) The thirty nominated members of Seanad Éireann shall be nominated by the President of the Executive Council who shall, in making such nominations, have special regard to the providing of representation for groups or parties not then adequately represented in Dáil Éireann.
- (c) The thirty elected members of Seanad Éireann shall be elected by Dáil Éireann voting on principles of Proportional Representation.
- (d) Of the thirty nominated members, fifteen to be selected by lot, shall hold office for the full period of twelve years, the remaining fifteen shall hold office for the period of six years.

- (e) Of the thirty elected members the first fifteen elected shall hold office for the period of nine years, the remaining fifteen shall hold office for the period of three years.
- (f) At the termination of the period of office of any such members, members shall be elected in their place in manner provided by Article 32 of this Constitution.
- (g) Casual vacancies shall be filled in manner provided by Article 34 of this Constitution.

Article 83

The passing and adoption of this Constitution by the Constituent Assembly and the British Parliament shall be announced as soon as may be, and not later than the sixth day of December, nineteen hundred and twenty-two, by Proclamation of His Majesty, and this Constitution shall come into operation on the issue of such Proclamation.

SECOND SCHEDULE ABOVE REFERRED TO

ARTICLES OF AGREEMENT FOR A TREATY BETWEEN GREAT BRITAIN AND IRELAND

(For text of Treaty see p. 302 above)

III

Irish Free State (Consequential Provisions) Act, 1922 (Session 2).

An Act to make such provisions as are consequential on or incidental to the establishment of the Irish Free State.
(5th December 1922.)

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) Subject to the provisions of the First Schedule to this Act, the Government of Ireland Act, 1920, shall cease to apply to any part of Ireland other than Northern Ireland, and in the event of such an address as is mentioned in Article 12 of the Articles of Agreement for a treaty between Great Britain and Ireland set forth in the Schedule to the Irish Free State (Agreement) Act, 1922, being presented to His Majesty by both Houses of the Parliament of Northern Ireland within the time mentioned in that Article, the Government of Ireland Act, 1920, and the other enactments mentioned in the First Schedule to this

Act, shall, as from the date of the presentation of such address, have effect subject to the modifications set out in that Schedule.

(2) Until the said address is presented or the expiration of the month mentioned in the said Article 12, whichever may be the earlier, the present Lord Lieutenant shall continue to exercise the functions of Lord Lieutenant as respects Northern Ireland.

2. The provisions set out in the Second Schedule to this Act shall have effect with respect to the retirement and abolition of office of existing Irish judges, Lord Chancellor of Ireland and Irish Land Commissioners, and any pensions and allowances payable thereunder shall be charged on and be payable out of the Consolidated Fund or the growing produce thereof.

3.—(1) For the purpose of providing in Ireland cottages, with or without plots or gardens, for the accommodation of men who served in any of His Majesty's naval, military, or air forces in the late war, and for other purposes incidental thereto a body shall be established consisting of five members, of whom three shall be appointed by a Secretary of State, one by the President of the Executive Council of the Irish Free State, and one by the Prime Minister of Northern Ireland.

(2) The body so established shall be a body corporate by the name of the Irish Sailors and Soldiers Land Trust, with perpetual succession and a common seal, and is in this section referred to as "the Trust."

(3) For the purposes aforesaid, the Trust shall have all the powers which are conferred upon the Local Government Board for Ireland by section four of the Irish Land (Provision for Sailors and Soldiers) Act, 1919, including power to carry out the schemes made under that section by that Board prior to the passing of this Act, and such powers of management, sale, disposal and otherwise as may be conferred on them by regulations made by the Treasury, and all property, assets, rights and liabilities held, enjoyed or borne by the Local Government Board for Ireland in connection with any schemes so made by them shall be transferred to the Trust:

Provided that the provisions of the said section relating to the compulsory acquisition of land, limiting the time within which the power to acquire land may be exercised by the Board, and regulating the expenses and receipts and audits of accounts of the Board shall not apply to the Trust.

(4) There shall be paid to the Trust out of moneys provided by Parliament, at such times and in such instalments as the Treasury may direct, a sum not exceeding one million five hundred thousand pounds, and the sum so received and all

other receipts of the Trust shall be applied by the Trust to the purposes for which the Trust is created.

(5) The Treasury may make regulations as to the procedure of the Trust and as to the application of the proceeds of sale, and as to the audit of the accounts of the Trust, and generally as to the manner in which the Trust shall carry out their powers and duties, and the Trust shall act in accordance with those regulations.

(6) The term of office of a member of the Trust shall be such as may be determined by the authority by whom he is appointed, but the Trust may act notwithstanding any vacancy in their number.

(7) This section shall not come into operation until the Treasury certify that such legislation has been passed by the Parliament of the Irish Free State and the Parliament of Northern Ireland as is necessary to enable the Trust to acquire and to hold land, to vest in the Trust any land and other property which is under this section to be transferred to the Trust, and otherwise to enable the Trust to carry out the purposes of this section.

4.—(1) In the event of such an address as is mentioned in Article 12 of the said Articles of Agreement being presented to His Majesty within the time mentioned in that Article, it shall be lawful for the Commissioners of Customs and Excise to make regulations with reference to the importation and exportation of any goods into and from Northern Ireland otherwise than by sea or in aircraft, for the purpose of safeguarding the revenue and preventing and regulating the importation and exportation of prohibited and restricted goods, and by such regulations to apply to such importation and exportation any of the provisions of the Customs Acts subject to such modifications as may be necessary to adapt them to importation and exportation of goods by land, and in particular the regulations may—

- (a) prohibit the importation and exportation of all goods or any classes of goods except by such routes within Northern Ireland, and during such hours, as may be prescribed;
- (b) prescribe the places where, and the form and manner in which, entry of goods imported or exported shall be made and duty on goods imported shall be paid.

(2) If any person contravenes or fails to comply with any such regulations, he shall be guilty of an offence under the Customs Acts and shall for every such offence, in addition to any other penalty to which he may be liable, incur a fine not exceeding one hundred pounds, and the goods in respect of which the offence is committed shall be forfeited.

5.—(1) If His Majesty in Council is pleased to declare—

- (a) that under the law in force in the Irish Free State any tax is payable in respect of a subject of charge in respect of which a corresponding tax is payable also in Great Britain; and
- (b) that arrangements as specified in the declaration have been made with the Government of the Irish Free State with a view to the granting of relief in cases where there is a charge both to the British tax and to the Irish tax in respect of the same subject matter;

then, unless and until the declaration is revoked by His Majesty in Council, the arrangements specified therein shall, so far as they relate to the relief to be granted from the British tax, have effect as if enacted in this Act, but only if and so long as the arrangements, so far as they relate to the relief to be granted from the Irish tax, have the effect of law in the Irish Free State.

(2) Any declaration made by His Majesty in Council under this section shall be laid before the Commons House of Parliament as soon as may be after it is made, and, if an Address is presented to His Majesty by that House within twenty-one days on which that House has sat next after the declaration is laid before it praying that the declaration may be revoked, His Majesty in Council may revoke the declaration, and the arrangements specified in the declaration shall thereupon cease to have effect, but without prejudice to the validity of anything previously done thereunder or to the making of a new declaration.

(3) The obligation as to secrecy imposed by any enactment with regard to any tax to which any declaration made by His Majesty in Council under this section relates shall not prevent the disclosure to any authorised officer of the Government of the Irish Free State of such facts as may be necessary to enable relief to be duly given in accordance with the arrangements specified in the declaration.

(4) In the event of such an address as is mentioned in Article 12 of the said Articles of Agreement being presented to His Majesty by both Houses of the Parliament of Northern Ireland within the time mentioned in that Article, this section shall—

- (a) in relation to any tax which is a reserved tax within the meaning of the Government of Ireland Act, 1920, have effect as if Great Britain included Northern Ireland; and
- (b) in relation to any tax which is not such a reserved tax as aforesaid, apply to Northern Ireland in like manner as it applies to Great Britain, but, if and so far as a declaration made under this section relates to any such tax,

the declaration shall not extend to Northern Ireland without the consent of the Government of Northern Ireland.

6.—(1) His Majesty may, by Order in Council,—

- (a) make such adaptations of any enactments so far as they relate to any of His Majesty's Dominions other than the Irish Free State as may appear to him necessary or proper as a consequence of the establishment of the Irish Free State;
- (b) make such provision as may appear to him necessary or proper for effecting the severance of the system of national health insurance in Great Britain from that in the Irish Free State, and for giving effect to any arrangements which may be made with the Irish Free State for that purpose, and for requiring such transfers of funds of societies and branches whose principal office is situate in Great Britain as may be necessary to give effect to any apportionments made in pursuance of the Order, and as to the application and disposal of the funds so transferred, and for extending to Northern Ireland and to societies and branches whose principal office is situate in Northern Ireland the like provisions as are made by any such Order in respect to Great Britain and societies and branches whose principal office is situate in Great Britain;
- (c) give effect to any reciprocal arrangements which may be made with the Irish Free State with respect to unemployment insurance;
- (d) make such provision with respect to the management of the National Debt and Government Securities and Annuities (including India Stock) as may be necessary to secure that the management thereof shall not, except to such extent as may be authorised by the Order, be transacted within the Irish Free State; or to enable the business of the Bank of Ireland in relation thereto to be partly transacted at an office of the Bank in Northern Ireland, and in the latter case to apply in respect of any securities or annuities inscribed or registered in the books and registers kept at such office the provisions applicable in respect of securities and annuities inscribed or registered in the books and registers kept at the Bank of England or the Bank of Ireland;

and any such Order in Council may contain such supplemental, consequential, and incidental provisions as may appear necessary or proper for the purposes of the Order, and any such Order

shall, subject to revocation or alteration by a subsequent Order, have effect as if enacted in this Act.

(2) Any Order in Council made under this section shall be laid before both Houses of Parliament as soon as may be after it is made, and if an Address is presented to His Majesty by either of those Houses within twenty-one days on which that House has sat next after any such Order is laid before it praying that the Order may be annulled, His Majesty may thereupon by Order in Council annul the same, and the Order so annulled shall forthwith become void, but without prejudice to the validity of anything which in the meantime may have been done thereunder.

(3) Section one of the Rules Publication Act, 1893, shall not apply to any Order in Council made under this section.

7.—(1) It shall be lawful for any department of the British Government to make arrangements with any Minister of the Government of the Irish Free State whereunder any of the powers and duties of the Minister may be exercised and performed on his behalf by officers of that department, or whereunder any of the powers and duties of that department may be exercised and performed on behalf of that department by officers of the Minister, on such terms and conditions as may be agreed:

Provided that no such arrangement shall diminish in any respect the responsibility of the department by which the arrangement is made.

(2) The Treasury may, if arrangements for the purpose are made with the Irish Free State or Northern Ireland, declare the revenue of the Irish Free State or the revenue of Northern Ireland (as the case may be) to be a public fund for the purposes of the Superannuation Act, 1892, and rules made by the Treasury under that Act and under section seven of the Superannuation Act, 1909, may, if and so far as such arrangements so require, vary the provisions of the first-mentioned Act as to the manner in which the amounts to be paid out of different funds and accounts are to be apportioned:

Provided that nothing in this section shall prejudice the application of the first-mentioned Act to any office or employment in Northern Ireland to which it is applied by the Government of Ireland Act, 1920.

For the purposes of this subsection, the revenue of the Irish Free State shall, as respects the period between the thirty-first day of March, nineteen hundred and twenty-two, and the date of the establishment of the Irish Free State, be deemed to include the revenue of the Provisional Government.

(3) In the event of a Post Office Savings Bank being established in the Irish Free State and arrangements being made with the Irish Free State for the transfer to the Post Office Savings Bank of the Irish Free State of the deposits of depositors resident in the Irish Free State, it shall be lawful for the National Debt Commissioners to transfer to such authority as may be provided by legislation of the Irish Free State such apportioned part of the assets held on behalf of the Post Office Savings Bank as may be determined by agreement between the British Government and the Government of the Irish Free State to be properly attributable to the deposits so transferred:

Provided that nothing in or done under this subsection shall affect the rights under the Post Office Savings Bank Acts of any depositor in the Post Office Savings Bank without the consent of the depositor.

8. This Act may be cited as the Irish Free State (Consequential Provisions) Act, 1922 (Session 2).

SCHEDULES

FIRST SCHEDULE

MODIFICATION OF THE GOVERNMENT OF IRELAND ACT, 1920, &c.

1.—(1) There shall be a Governor of Northern Ireland, and the provisions of the Government of Ireland Act, 1920, with respect to the Lord Lieutenant shall apply to the Governor of Northern Ireland and in the Government of Ireland Act, 1920 (hereinafter referred to as the principal Act) and in any other enactment references to the Lord Lieutenant shall, in their application to Northern Ireland, be construed as references to the Governor of Northern Ireland.

(2) In section 3 of the Lord Lieutenants' and Lord Chancellor's Salaries (Ireland) Act, 1832, eight thousand pounds shall be substituted for twenty thousand pounds as the salary of the Governor of Northern Ireland, and in subsection (3), of section thirty-seven of the principal Act two thousand pounds shall be substituted for five thousand pounds as the sum to be deducted towards the payment of such salary:

Provided that out of the said salary of eight thousand pounds there shall be payable the salaries and allowances of members of the personal staff of the Governor.

2.—(1) There shall be a Privy Council of Northern Ireland, and anything which, prior to the first appointment of a Governor

of Northern Ireland, might be done by, to, before, or with the advice or concurrence of the Privy Council of Ireland or any committee thereof may, as respects Northern Ireland after such appointment, be done by, to, before, or with the advice or concurrence of the Privy Council of Northern Ireland or a corresponding committee of that Council.

(2) The persons who are to be members of the Privy Council of Northern Ireland shall be from time to time chosen and summoned by the Governor of Northern Ireland and sworn in as Privy Counsellors, and the members may from time to time be removed by the Governor of Northern Ireland.

(3) In the application of the principal Act to Northern Ireland references to the Privy Council of Northern Ireland shall be substituted for references to the Privy Council of Ireland, and after the expiration of one month from the first appointment of a Governor of Northern Ireland no person shall be a minister of Northern Ireland unless he is a member of the Privy Council of Northern Ireland.

(4) There shall be a Great Seal of Northern Ireland which shall be kept by the Governor of Northern Ireland and shall, after the first appointment of such Governor, be used for all matters in Northern Ireland for which the Great Seal of Ireland was theretofore used. Until a Great Seal of Northern Ireland is provided the private seal of the Governor of Northern Ireland may be used as that Great Seal.

3.—(1) The constitution of the Council of Ireland shall, if identical Acts for the purpose are passed by the Parliament of the Irish Free State and the Parliament of Northern Ireland, be altered in accordance with those Acts.

(2) The appointed day for the transfer in relation to Northern Ireland of the powers, which by the principal Act are made powers of the Council of Ireland, shall be such day as may hereafter be fixed by Order in Council not being earlier than the day on which any such identical Acts as aforesaid come into operation or the expiration of the period of five years from the passing of this Act, whichever may first happen:

Provided that the appointed day for the purposes of so much of section ten of the principal Act as enacts that "the rates, fares, tolls, dues, and other charges directed by the Minister of Transport under the Ministry of Transport Act, 1919, and in force on the appointed day, may be charged until fresh provision shall be made by the Council of Ireland, or the Parliament of the United Kingdom, with regard to the amount of any such rates, fares, tolls, dues, and other charges" shall be the date of the passing of this Act; but until such fresh

provision is made, the Railway and Canal Commission shall have the like power of modifying such charges in Northern Ireland as is by section sixty of the Railways Act, 1921, conferred on the rates tribunal as respects railways in Great Britain.

4.—(1) (a) The contribution to be made under section twenty-three of the principal Act towards the Imperial liabilities and expenditure therein referred to shall be a contribution to be made by Northern Ireland and to be called the Northern Ireland contribution, and the provisions of that section with respect to apportionment as between Southern Ireland and Northern Ireland shall cease to have effect.

(b) The amount of the Northern Ireland contribution in each year until the end of the second financial year after the appointed day shall be a sum calculated at the rate of seven million nine hundred and twenty thousand pounds a year, or such less sum as the Joint Exchequer Board may, in exercise of the powers conferred on them by subsection (5) of that section, substitute therefor, and those powers may be exercised at any time whether before or after the end of the said second financial year or before or after a contribution has been made at the rate aforesaid.

(c) The Joint Exchequer Board, in determining the just proportion of Imperial liabilities and expenditure to be contributed by Northern Ireland in respect of each financial year after the end of the said second financial year shall have regard to the relative taxable capacities of Northern Ireland on the one hand and Great Britain and Ireland on the other hand.

(2) The apportionment of the proceeds of reserved taxes to be made by the Joint Exchequer Board under section twenty-two of the principal Act shall be an apportionment as between Great Britain and Northern Ireland instead of an apportionment as between Great Britain and Ireland, and the sum determined under the said section to be the Northern Ireland share of the said proceeds shall be called the Northern Ireland share of reserved taxes; and in making such an apportionment the Joint Exchequer Board shall have regard to the effect of any arrangement made with the Irish Free State for relief from double taxation which may unduly prejudice Great Britain in relation to Northern Ireland or Northern Ireland in relation to Great Britain.

(3)—(a) The sum charged upon and payable out of the Consolidated Fund of the United Kingdom under section twenty-four of the principal Act, and therein referred to as the Irish residuary share of reserved taxes, shall be paid to the Exchequer of Northern Ireland and shall be called the Northern Ireland residuary share of reserved taxes, and the provisions of that section with respect to apportionment between the Exchequers

of Southern Ireland and Northern Ireland shall cease to have effect, but without prejudice to the application of the principles governing such apportionment in any cases where an apportionment may be necessary for the purpose of ascertaining the sums to be deducted or to be made good by means of deductions from the Northern Ireland share or residuary share of reserved taxes.

(b) In ascertaining the net cost to the Exchequer of the United Kingdom of reserved services, the Joint Exchequer Board shall have regard to any increase of expenditure thereon which may appear to them to be attributable to the establishment of the Irish Free State, and shall make such allowance in respect of any such increase as may appear to them to be just.

5. Subsection (1) of section thirty-two of the principal Act, relating to the constitution of the Joint Exchequer Board shall have effect as if for the words "two members appointed by the Treasury one member appointed by the Treasury of Southern Ireland" there were substituted the words, "one member appointed by the Treasury," and any question which may be referred to the board under that section may be referred to them either by the Treasury or by the Treasury of Northern Ireland.

6.—(1) The High Court of Appeal for Ireland shall cease to exist, and sections forty-two and forty-three of the principal Act and any other provisions of that Act relative to that Court of Appeal shall cease to have effect.

(2) In any case where under section fifty of the principal Act an appeal would have lain to the High Court of Appeal for Ireland from a decision of a court in Northern Ireland an appeal shall lie to the Court of Appeal in Northern Ireland by virtue of this section. Questions under the Crown Cases Act, 1848, which would have been reserved for the decision of the High Court of Appeal for Ireland under section forty-three of the principal Act shall, in Northern Ireland, be reserved for the decision of the Court of Appeal in Northern Ireland whose decision shall, except as hereinafter provided, be final.

(3) An appeal shall lie to the House of Lords from any decision of the Court of Appeal in Northern Ireland being a decision from which an appeal would have lain to the House of Lords under section forty-nine of the principal Act had it been a decision of the High Court of Appeal for Ireland, and that section shall have effect accordingly with the substitution of references to the Court of Appeal in Northern Ireland for references to the High Court of Appeal for Ireland.

(4) Nothing in the foregoing provisions of this paragraph shall affect the right of appeal to the House of Lords from any decision of the High Court of Appeal for Ireland given before

the date when this Schedule comes into operation, and in the case of any appeal to the High Court of Appeal for Ireland which is pending at that date the decision of the court from which the appeal was taken shall, for the purposes of appeal to the House of Lords, be treated as if it were a decision of the High Court of Appeal for Ireland given immediately before that date.

7.—(1) The Civil Service Committee shall, instead of being constituted in the manner provided by subsection (2) of section fifty-six of the principal Act, consist of five members, of whom one shall be appointed by the Treasury, one by a Secretary of State, one by the Government of Northern Ireland, one by the existing Irish officers who have been transferred to the Government of Northern Ireland, and one (who shall be chairman) by the Lord Chief Justice of England.

(2) The powers of the Civil Service Committee (which shall hereafter be known as the Civil Service Committee for Northern Ireland) shall be exercisable in relation only to existing Irish officers who have been transferred from the Government of the United Kingdom to the Government of Northern Ireland under the principal Act, and in relation to existing or pensioned officers of local authorities or of a university or college in Northern Ireland.

IV

Statute of Westminster, 1931

An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930. [11th December, 1931.]

Whereas the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences:

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established

constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained:

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. In this Act the expression "Dominion" means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

2.—(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same as part of the law of the Dominion.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or to be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

5. Without prejudice to the generality of the foregoing provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

6. Without prejudice to the generality of the foregoing provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

7.—(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

9.—(1) Nothing in this Act shall be deemed to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United

Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth.

10.—(1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in subsection (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand and Newfoundland.

11. Notwithstanding anything in the Interpretation Act, 1889, the expression "Colony" shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

12. This Act may be cited as the Statute of Westminster, 1931.

V

Ireland (Confirmation of Agreement) Act, 1925

CHAPTER 77

An Act to confirm and give effect to a certain Agreement amending and supplementing the Articles of Agreement for a Treaty between Great Britain and Ireland to which the force of law was given by the Irish Free State (Agreement) Act, 1922, and by the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922. (10th December, 1925.)

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Confirmation of Agreement

1—(1) The Agreement set forth in the Schedule to this Act, being an Agreement amending and supplementing the Articles of Agreement for a Treaty between Great Britain and Ireland, to which the force of law was given by the Irish Free State (Agreement) Act, 1922, and by the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922, is hereby confirmed, and the said Articles of Agreement for a Treaty and the Irish Free State (Agreement) Act, 1922, shall have effect accordingly.

(2) The date as from which the powers in relation to Northern Ireland, which by the Government of Ireland Act, 1920, are made powers of the Council of Ireland, are to be transferred to the Parliament and Government of Northern Ireland, shall be the first day of April, nineteen hundred and twenty-six, and that day shall, in relation to the transfer of those powers, be the appointed day for the purposes of the Government of Ireland Act, 1920; and as from that day so much of the Government of Ireland Act, 1920, and the Irish Free State (Consequential Provisions) Act, 1922 (Session 2), as relates to the Council of Ireland is hereby repealed:

Provided that this repeal shall not affect the provisions of subsection (2) of section ten of the Government of Ireland Act, 1920, as modified by paragraph 3 of the First Schedule to the Irish Free State (Consequential Provisions) Act, 1922 (Session 2) with respect to the rates, fares, tolls, dues and other charges authorised to be charged by railway companies in Northern Ireland or the powers of the Railway and Canal Commission thereunder, until fresh provision is made by the Parliament of Northern Ireland with regard to the amount of any such rates, fares, tolls, dues and other charges.

Short title and commencement

2.—(1) This Act may be cited as the Ireland (Confirmation of Agreement) Act, 1925.

(2) This Act shall come into operation on the date on which the said Agreement is confirmed by Act of the Parliament of the Irish Free State, or if such an Act is passed before the passing of this Act shall come into operation on the passing of this Act,

SCHEDULE

AGREEMENT AMENDING AND SUPPLEMENTING THE ARTICLES OF AGREEMENT FOR A TREATY BETWEEN GREAT BRITAIN AND IRELAND TO WHICH THE FORCE OF LAW WAS GIVEN BY THE IRISH FREE STATE (AGREEMENT) ACT, 1922, AND BY THE CONSTITUTION OF THE IRISH FREE STATE (SAORSTÁT EIREANN) ACT, 1922.

Whereas on the sixth day of December, nineteen hundred and twenty-one Articles of Agreement for a Treaty between Great Britain and Ireland were entered into:

And whereas the said Articles of Agreement were duly ratified and given the force of law by the Irish Free State (Agreement) Act, 1922, and by the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922:

And whereas the progress of events and the improved relations now subsisting between the British Government, the Government of the Irish Free State, and the Government of Northern Ireland, and their respective peoples, make it desirable to amend and supplement the said Articles of Agreement, so as to avoid any causes of friction which might mar or retard the further growth of friendly relations between the said governments and peoples:

And whereas the British Government and the Government of the Irish Free State being united in amity in this undertaking with the Government of Northern Ireland, and being resolved mutually to aid one another in a spirit of neighbourly comradeship, hereby agree as follows:—

1. The powers conferred by the proviso to Article 12 of the said Articles of Agreement on the Commission therein mentioned are hereby revoked, and the extent of Northern Ireland for the purposes of the Government of Ireland Act, 1920, and of the said Articles of Agreement, shall be such as was fixed by subsection (2) of section one of that Act.

2. The Irish Free State is hereby released from the obligation under Article 5 of the said Articles of Agreement to assume the liability therein mentioned.

3. The Irish Free State hereby assumes all liability undertaken by the British Government in respect of malicious damage done since the twenty-first day of January nineteen hundred and nineteen to property in the area now under the jurisdiction of the Parliament and Government of the Irish Free State, and the Government of the Irish Free State shall repay to the British

Government, at such time or times and in such manner as may be agreed upon, moneys already paid by the British Government in respect of such damage, or liable to be so paid under obligations already incurred.

4. The Government of the Irish Free State hereby agrees to promote legislation increasing by ten per cent. the measure of compensation under the Damage to Property (Compensation) Act, 1923, in respect of malicious damage to property done in the area now under the jurisdiction of the Parliament and Government of the Irish Free State between the eleventh day of July, nineteen hundred and twenty-one, and the twelfth day of May, nineteen hundred and twenty-three, and providing for the payment of such additional compensation by the issue of Five per Cent. Compensation Stock or Bonds.

5. The powers in relation to Northern Ireland which by the Government of Ireland Act, 1920, are made powers of the Council of Ireland, shall be and are hereby transferred to and shall become powers of the Parliament and the Government of Northern Ireland; and the Governments of the Irish Free State and of Northern Ireland shall meet together as and when necessary for the purpose of considering matters of common interest arising out of or connected with the exercise and administration of the said powers.

6. This Agreement is subject to confirmation by the British Parliament and by the Oireachtas of the Irish Free State, and the Act of the British Parliament confirming this Agreement shall fix the date as from which the transfer of the powers of the Council of Ireland under this Agreement is to take effect.

Dated this 3rd day of December, 1925.

Signed on behalf of the British Government.	Signed on behalf of the Govern- ment of the Irish Free State.
--	--

STANLEY BALDWIN.

LIAM T. MACCOSAIR.

WINSTON S. CHURCHILL.

KEVIN O'HIGGINS.

W. JOYNSON-HICKS.

EARNAN DE BLAGHD.

BIRKENHEAD.

L. S. AMERY.

Signed on behalf of the
Government of Northern
Ireland.

JAMES CRAIG.

CHARLES H. BLACKMORE (Secretary to the
Cabinet of Northern Ireland).

VI

*The Alleged Blythe-Churchill Agreement*HEADS OF THE ULTIMATE FINANCIAL SETTLEMENT BETWEEN THE
BRITISH GOVERNMENT AND THE GOVERNMENT OF THE IRISH
FREE STATE.

1. The Government of the Irish Free State undertake to pay to the British Government at agreed intervals the full amount of the annuities accruing due from time to time under the Irish Land Acts, 1891-1909, without any deduction whatsoever whether on account of Income Tax or otherwise.

2. The Government of the Irish Free State agree to pay to the British Government prior to March 31st, 1926, the sum of approximately £550,000 being the amount hitherto withheld by them in respect of income tax on annuities payable under the above-mentioned Acts.

3. The British Government accept liability for the provision out of monies provided by Parliament of the cost of the interest and sinking fund on bonus and excess stock under the above-mentioned Acts subject to a contribution by the Irish Free State Government of the sum of £160,000 in the year 1926-27 and at the rate of £134,500 per annum thereafter.

4. It is agreed between the two Governments that the question of double income tax shall be settled generally on the residence basis as elaborated in the scheme which has already been provisionally agreed between the Revenue Departments of the two Governments. The two Governments agree to promote any legislation necessary for this purpose to take effect from the beginning of the financial year 1926-27.

5. The Irish Free State Government agree to discharge their liability outstanding on 1st April 1926 in respect of the Local Loans Fund by the payment of an annuity payable half-yearly of £600,000 to the Fund for a period of 20 years payable on the 1st January and the 1st July in each year, the first half-yearly payment being payable on the 1st July, 1926.

6. Subject to the provisions of this Agreement the British Government undertake to make no further claim in respect of any portion of the value of property taken over by the Irish Free State belonging to British Government Departments whose administrations and powers were under Article 9 of the Provisional Government (Transfer of Functions) Order in Council of 1st April 1922 excluded from transfer to the Irish Free State Government,

Provided that

(a) This paragraph shall not be held to affect the position in regard to the Kilmainham Hospital, the Royal Hibernian School and the Tully Stud Farm.

(b) Nothing in this paragraph shall prejudice the right of the British Government to be indemnified under paragraph 8 of the despatch from the Colonial Office of the 13th October 1924.

7. The Irish Free State Government agree to pay to the British Government the sum of £275,000 in full and final discharge of all claims made to the Compensation (Ireland) Commission in respect of damage done prior to July 11th 1921 to property belonging to any of the British Government Departments mentioned in the last preceding paragraph:

Provided that this paragraph shall not be held to affect the liability of the Irish Free State Government to satisfy awards of the Compensation (Ireland) Commission made in respect of claims preferred by British Government Departments on behalf of private individuals or the Government of Northern Ireland.

8. The British Government waive all claims against the Government of the Irish Free State for the refund of any portion of the sums paid by them under section 1 of the Irish Railways (Settlement of Claims) Act, 1921.

9. The Government of the Irish Free State agree to pay to the British Government so much of the deficit of the Unemployment Fund of the United Kingdom as may be attributable to the Irish Free State on the basis of the relative proportions of the insured populations of the two countries as at 31st March 1922 with interest thereon from that date.

10. The Irish Free State Government agree to make no claim in respect of any of the assets of the Consolidated Fund of the United Kingdom including *inter alia* the Civil Contingency Fund and receipts on account of Reparations and Inter-Allied Debts.

11. The Irish Free State Government agree to repay to the British Government 75 per cent. of the pensions and compensation allowances payable to ex-members of the Royal Irish Constabulary under the Constabulary Acts, subject to the exception mentioned in Article 10 of the Articles of Agreement for a Treaty between Great Britain and Ireland.

12. For the purposes of any previous agreements between the two Governments, this Agreement shall be deemed to be the ultimate financial settlement mentioned therein.

WINSTON S. CHURCHILL.
EARNAN DE BLAGHD,

19th March, 1926.

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